SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 60.

MARCHIE TIGER, PLAINTIFF IN ERROR,

vs.

THE WESTERN INVESTMENT COMPANY AND ELLIS H. HAMMETT, R. C. ALLEN, AND J. C. PINSON, COPARTNERS UNDER THE NAME OF COWETA REALTY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 In the Supreme Court of the United States, October Term, 1908. In Equity.

MARCHIE TIGER, Plaintiff in Error,

vs.

THE WESTERN INVESTMENT COMPANY, a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Defendants in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Marchie Tiger, Plaintiff in the above cause and would show unto this Honorable Court that in the record and proceedings, and rendition of the decree in the above cause by the Supreme Court of the State of Oklahoma, it being the highest Court of said state, in which a decision could be had on the said suit between Marchie Tiger and the Western Investment Company, a corporation and Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners under the name of Coweta Realty Company, manifest error has occurred greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question, the construction of Sections 19 and 22 of
2 the Act of Congress approved April 26, 1906, and the decision was against the right and privilege especially set up and claimed by plaintiff in error under the said Sections; that Marchie Tiger, plaintiff in error, claimed and asserted in the said proceedings that by virtue of Section 19 of the said Act of Congress, the restrictions on the lands inherited by him, a full blood Indian of the Creek Tribe, from full blood allottees of said Tribe, had been thereby extended for a period of 25 years from the date of the passage and approval of the said Act and also that the lands so inherited by him by virtue of Section 22 of the said Act of Congress of April 26, 1906, were under restrictions and not subject to alienation or conveyance except upon the approval of the Secretary of the Interior under rules and regulations prescribed by him; all of which is fully apparent in the record and proceedings in the cause and specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made and judgment and decree rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

W. L. STURDEVANT,
WM. A. BRIGHAM,
Solicitors for Marchie Tiger, Plaintiff in Error.

3 [Endorsed:] Equity No. —. Marchie Tiger, Plaintiff in Error, *vs.* The Western Investment Co., a corporation, and Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners, under the name of Coweta Realty Company, Defendants in Error. Petition for Writ of Error. Filed Jul- 21, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

4 In the Supreme Court of the United States.

MARCHIE TIGER, Plaintiff in Error,

vs.

THE WESTERN INVESTMENT CO., a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Defendants in Error.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice and against the rights of the plaintiff in error in the following particulars to-wit:

First. The said Supreme Court erred in holding and deciding that Section 19 of an Act of Congress approved April 26, 1906, did not extend, for a period of twenty-five (25) years from the date of its passage and approval, the restrictions upon the land inherited, by a full-blood Creek Indian and member of the Creek tribe, from a full-blood Creek Indian and allottee of said tribe.

Second. Section 19 of the said Act of Congress approved April 26, 1906, among other things, provides:

"That no full-blood Indian of the Choctaw, Cherokee, Chickasaw, Creek or Seminole Tribe shall have the power to alienate,

5 sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five (25) years from and after the passage of this Act, unless restrictions shall, prior to the expiration of said period, be removed by Act of Congress."

That the said Supreme Court erred in holding and deciding that said Section 19 limited the restrictions therein imposed to *allotments only*, and that no restrictions were thereby imposed upon lands inherited by a full-blood Indian of the Creek Tribe from a full-blood allottee of said Tribe, such lands being a part of the tribal property of said tribe previously allotted according to law, notwithstanding.

Third. Section 22 of the said Act of Congress of April 26, 1906, provides, among other things, as follows:

"All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

That the said Supreme Court erred, in holding and deciding that said provision has no application to the Plaintiff in Error, an heir who is a full-blood Indian; and that the lands in controversy, inherited by him from full-blood Indian allottees of his tribe, could be conveyed and his title thereto divested without the approval of the Secreary of the Interior.

Fourth. Section 22 of the said Act of April 26, 1906, among other things, provides:

"That the adult heirs of any deceased Indian of the Five Civilized Tribes whose selection has been made or to whom a deed or patent has been issued for his or her part of the land of the tribe to which he or she belongs or belonged may sell and convey the lands
6 inherited from such decedent * * * All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

That the said Supreme Court erred in holding and deciding that the Plaintiff in Error could convey and did convey and thereby vested the purchasers with a good and indefeasible title to the lands in controversy in the above action without the approval of the Secretary of the Interior, under rules and regulations prescribed by him, such lands having been inherited by him, a full-blood Indian and member of the Creek tribe, from full-blood allottees of said tribe and in holding and deciding that the above provisions of said Section 22 are nugatory, inoperative and inapplicable to the subject of inherited lands of full-bloods and do not affect the status of restrictions or right of alienation of such lands as provided by the Act of June 30, 1902; and in holding and deciding that the only effect of the last sentence in said Section 22 was to neutralize the first sentence of said section, thus leaving the law of inherited lands of full-blood Indians as fixed by Section 16 of the Act of June 30th, 1902, and thereby depriving said provisions of Section 22 of either purpose or application.

Fifth. The said Supreme Court erred in reversing the judgment and decree by the trial court rendered in said cause and in refusing to give and denying to plaintiff in error the protection and rights afforded him under the Acts of Congress aforesaid.

Wherefore, by these and other manifest errors appearing in the record the said Marchie Tiger, plaintiff in error, prays that the judgment of the said Supreme Court of Oklahoma be reversed and set aside and for naught held and that a judgment and decree
7 be rendered for plaintiff in error granting him his rights and protection under the statutes and laws of the United States and also prays judgment for his costs.

W. L. STURDEVANT,
WM. A. BRIGHAM,
Attorneys for Marchie Tiger, Plaintiff in Error.

8 [Endorsed:] Equity No. —. Marchie Tiger, Plaintiff in Error, *vs.* The Western Investment Co., a corporation, and Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners under the name of Coweta Realty Company, Defendants in Error. Assignment of Errors. Filed Jul- 21, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

9 In the Supreme Court of the State of Oklahoma.

THE WESTERN INVESTMENT COMPANY, a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

On this 21st day of July, 1908, came on to be heard the application of Marchie Tiger, plaintiff, defendant in error in the above Court, said plaintiff being represented by Counsel, for a writ of error, and it appearing to the Court from the petition filed herein, and the record in the cause that the application ought to be granted and that a transcript of the record and proceedings and papers on which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff giving bond, conditioned as the law directs, in the sum of $500.00 *Dollars*, which may operate as a supersedeas and that a true copy of the record, assignment of errors, and all proceedings had in the case in the Supreme Court of the State of Oklahoma shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Court may inspect the same and do, what according to law should be done.

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

10 [Endorsed:] Equity No. —. The Western Investment Company, a corporation, and Ellis H. Hammett, R. C. Allen, and J. C. Pinson, co-partners, under the name of Coweta Realty Company, Plaintiffs in Error, *vs.* Marchie Tiger, Defendant in Error. Order of Court. Filed Jul- 21, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

11 In the Supreme Court of the State of Oklahoma.

THE WESTERN INVESTMENT COMPANY, a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

We, the undersigned Attorneys and Councelors at Law, hereby enter our appearance as Attorneys for Marchie Tiger, Defendant in Error in the above cause under the authority contained in the instrument in writing, executed by Marchie Tiger, attached hereto and filed herewith.

W. L. STURDEVANT.
WM. A. BRIGHAM.

12 In the Supreme Court of the State of Oklahoma.

THE WESTERN INVESTMENT COMPANY, a Corporation, and the COWETA REALTY COMPANY, a Partnership Composed of Ellis H. Hammett, R. C. Allen, and J. C. Pinson, Plaintiffs in Error,

v.

MARCHIE TIGER, Defendant in Error.

This writing witnesses that,—

Whereas heretofore, to-wit, on the — day of June, 1908, the above court rendered a decision in the above entitled cause reversing the decision of the lower court therein, and against the undersigned Marchie Tiger defendant in error, the said decision being adverse to the rights and privileges claimed by the said undersigned under sections 19 and 22 of the Act of April 26, 1906, and,—

Whereas the said undersigned desires to prosecute his appeal to the Supreme Court of the United States and to obtain the decision of the said Supreme Court of the United States in said cause and the construction of the said Statutes, and for such relief as he believes himself entitled to and for the correction of the errors of the above Court.

Now, therefore, I, the undersigned Marchie Tiger, do hereby authorize and empower W. A. Brigham and W. L. Sturdevant, Attorneys and Counselors at law to represent me and my interests and appear for as such Attorneys and Counselors for all the purposes necessary and requisite to obtaining a writ *or* error to the said Supreme Court of the United States and to do all things necessary to obtain a final decision of said Court in the said cause

his
MARCHIE x TIGER,
mark.
Defendant in Error.

Witnesses to Signature,
MAUDE ROBERTS.
HASKELL B. TALLEY.

13 [Endorsed:] Equity No. —. The Western Investment Co., a corporation, and Ellis H. Hammett, R. C. Allen, and J. C. Pinson, co-partners under the name of Coweta Realty Company, Plaintiffs in Error, *vs.* Marchie Tiger, Defendant in Error. Entry of Appearance as Attorneys for Defendant in Error. Filed Jul- 21, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

14 In the Supreme Court of the United States.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma:

Because in the record and proceedings, as also in the rendition of the judgment, of an appeal which is in said Court before you, or

some of you, between Marchie Tiger designated as defendant in error and The Western Investment Company, a corporation, and Ellis H. Hammett, R. C. Allen and J. C. Pinson co-partners under the name of Coweta Realty Company designated as plaintiffs in error therein, your court being the highest court in said state having jurisdiction to render judgment in the case; there was drawn in question the construction of sections 19 and 22 of an Act of Congress approved April 26, 1906, and the decision was against the right, immunity and privilege specially set up and claimed by the said Marchie Tiger under the said sections 19 and 22 of the said Act of Congress approved April 26, 1906, and there being manifest errors in said decision greatly to the damage of Marchie Tiger, the petitioner in error, we being willing that if there is error it should be duly corrected, we do therefore, command you, if judgment be therein given, that under the seal of your Court, you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that to have the same at Washington on Monday the Twelfth day of October, A. D. 1908, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

15 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 17 day of July A. D., 1908.

[Seal of the Circuit Court of the United States for the Eastern District of Oklahoma.]

L. G. DISNEY,
Clerk of the Circuit Court of the United States for the Eastern District of Oklahoma.

Allowed, on giving bond as required by law in the sum of $500.00, by

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Okla., ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereby subscribe my name, and affix the seal of said court, at office in the city of Guthrie, this 13th day of August, A. D. 1908.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy,*

16 [Endorsed:] Equity No. —. Marchie Tiger, Plaintiff in Error, *vs.* The Western Investment Co., a corporation, and Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners under the name of Coweta Realty Company, Defendants in Error. Writ of Error to the Supreme Court of Oklahoma. Filed Jul- 21, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

17 In the Supreme Court of the State of Oklahoma.

THE WESTERN INVESTMENT COMPANY, a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

Know all men by these presents, that we, Marchie Tiger, as principal and Southern Surety Company, a corporation of Oklahoma with general offices at Denison, Texas, as surety, are held and firmly bound unto The Western Investment Company, Ellis H. Hammett, R. C. Allen and J. C. Pinson copartners under the name of Coweta Realty Company above named, in the sum of Five Hundred ($500.00) Dollars to be paid to the said The Western Investment Company, a corporation and Ellis H. Hammett, R. C. Allen and J. C. Pinson co-partners under the name of Coweta Realty Company, their executors, assigns and administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and our and each of our executors, administrators and assigns firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1908.

Whereas, the above named defendant in error, Marchie Tiger, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment and decree in the above en-

18 titled cause by the Supreme Court of the said State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named Marchie Tiger shall prosecute said writ of error to effect and answer all costs, if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

his
MARCHIE x TIGER, *Principal.*
mark.

SOUTHERN SURETY COMPANY,
By P. M. FORD, *Attorney in Fact,*
Sureties.

[Seal Southern Surety Company, Incorporated 1907, Oklahoma.]

Witness to mark,
W. H. LAMM.

Approved: July 25, 1908.

W. H. L. CAMPBELL,
Clerk Supreme Court,
By W. M. BONNER, *Deputy.*

19 [Endorsed:] Equity No. 30. The Western Investment Company, a corporation, and Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners under the name of Coweta Realty Company, Plaintiffs in Error, *vs.* Marchie Tiger, Defendant in Error. Bond on Appeal. Filed Jul- 25, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

20 In the Supreme Court of Oklahoma.

No. 30.

WESTERN INVESTMENT COMPANY, a Corporation, and THE COWETA REALTY COMPANY, a Partnership Consisting of Ellis H. Hammett, R. C. Allen, and J. C. Pinson, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

Petition in Error.

The plaintiffs in error complain of the defendant in error, for that the defendant in error, at the October Term, 1907, *term* of the United States Court for the Western District of the Indian Territory, sitting at Muskogee, recovered a judgment, by the consideration of said court, against the plaintiff in error, in a certain action then pending in that court, in which the said Marchie Tiger was plaintiff and the said Western Investment Company and Coweta Realty Company were defendants. The transcript of the record of said action, duly certified and attested *if* filed herewith, and the plaintiffs in error herein aver that there was error in the proceedings and judgment of the said court as follows:

1. Said court erred in refusing to confirm the report of the Master in Chancery, A. A. Davidson, to whom the case was referred, and in setting aside and disaffirming the findings of fact and conclusions of law of the said Master.

2. Said Court erred in finding in favor of the plaintiff Marchie Tiger, and in entering upon his docket, under date November 4, 1907, the following:

"Master's report not confirmed; his findings of fact and conclusions of law are set aside and disaffirmed, and the court finds in favor of the plaintiff, and orders, adjudges and decrees that

21 upon the refunding to defendants and each of them the money received from the several conveyances, with interest at 6% per annum, from date of receipt, that defendant shall reconvey the land in question to said plaintiff, and upon failure so to do, the conveyance shall be made by the Master in Chancery of this Court,

the defendants to pay the costs as per decree entered," to the rendition of which judgment the defendants then and there excepted.

3. Said Court erred in entering upon his docket, under date November 6, 1907, the following:

"The court upon its own motion, notice thereof having been given R. C. Allen, attorney for defendants, in open court this day, modified order herein made November 4, 1907, in, that 'upon the refunding to defendants and each of them the money received from the several conveyances, with interest at 6% per annum, from date of receipt,' be stricken from said order" to the rendition of which the defendants then and there excepted.

4. Said court erred in entering the following decree:

"This cause coming on to be finally heard on this 6th day of November, 1907, upon the pleadings. Report of Master in Chancery, A. A. Davidson, to whom this cause was referred to take evidence and report his findings of fact and conclusions of law, stipulations, briefs and arguments of counsel, and the Court being fully advised in the premises, doth find:

That the plaintiff, Marchie Tiger, is a full-blood Indian citizen of the Creek Nation: that he had arrived at the full age of twenty-one years prior to the 8th of August, 1907; that he is the sole heir of Sam, Martha, Lydia and Louisa Tiger; that the said Sam, Martha, Lydia and Louisa Tiger died intestate in the Western District of the Indian Territory, prior to April 26, 1907, seized and possessed of their share of the lands of the Creek Nation, to which tribe of Indians they belonged; that on the 8th day of August, 1907,
22 Marchie Tiger, as the sole heir of Sam and Martha Tiger, conveyed to the Western Investment Company the said allotments of Sam and Martha Tiger, described in the complaint and answer herein; that on the 8th day of August, 1907, and 13th day of August, 1907, the said Marchie Tiger, as the sole heir of Lydia and Louisa Tiger, sold and conveyed to Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners, doing business under the firm name and style of The Coweta Realty Company, the allotments of Lydia and Louisa Tiger, as described in the complaint and answer herein; that the Western Investment Company paid for the lands so purchased the sum of Two Thousand Dollars; that The Coweta Realty Company paid for the lands so purchased the sum of Eight Hundred and Eighty-five dollars, and agreed to pay an additional sum of Eleven Hundred and fifteen dollars.

I further find that the restrictions upon the alienation of the lands described were not removed, and that the said deeds were not approved by the Secretary of the Interior.

It is therefore ordered, considered, adjudged and decreed that the prayer of plaintiff be allowed and that the defendants reconvey, by quit claim deed, to the plaintiff the said described lands within ten days from this date, and that upon failure to make said conveyance as aforesaid, it is ordered that the conveyance shall be made by the Master in Chancery of this Court, or Commissioner appointed by the Court.

It is further ordered that the costs of this action be adjudged against the defendants, for which execution may issue.

Dated this 6th day of November, 1907.

(Signed) WILLIAM R. LAWRENCE,
Judge of the United States Court for the Western District of the Indian Territory."

23 5. Said court erred in finding that the restrictions upon the alienation by the plaintiff, Marchie Tiger, of the lands in controversy, were not removed at the time of his deeds to the defendants, *i. e.*, on August 8th and 13th, 1907.

6. Said court erred in not finding that the deeds of the said Machie Tiger to the plaintiffs in error were *not* valid and effective conveyances of the lands in controversy.

7. Said court erred in not finding for the said Western Investment Company and Coweta Realty Company as prayed in the answers filed by them.

And the plaintiffs in error state that the decree of the said United States Court for the Western District of the Indian Territory was entered on November 6, 1907; that on November 15th the plaintiffs in error filed their writ of error, citation, bond and other necessary papers, intending to appeal the said case to the Court of Appeals of the Indian Territory; that the Clerk of the District Court was unable, in the press of business attending the transfer to statehood, to prepare the transcript of the said case; that the record of said case has been transferred to the District Court of Oklahoma, for Muskogee County, as the successor of the said United States Court for the Western District of the Indian Territory, and that the case is, at the filing hereof, in the condition above indicated.

Wherefore, the plaintiffs in error pray that this court, as the successor of the said Court of Appeals of Indian Territory, take cognizance of this case and entertain the said appeal, as provided by law; that the judgment rendered by the United States Court for the Western District of the Indian Territory, as above set forth, be by this court reversed; that a judgment be rendered in favor of
24 the plaintiffs in error and against the defendants in error upon the facts as found by the said Master in Chancery, A. A. Davidson and the said court; and that the title to the lands in controversy by declared to be in the plaintiffs in error, as prayed in the answers filed by them.

WESTERN INVESTMENT COMPANY.
THE COWETA REALTY COMPANY.
ROACH & BRADLEY, AND
ALLEN & PINSON.

Filed Dec. 30, 1907.

W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed on back: In the Supreme Court of Oklahoma—Western Investment Company, a corporation, and the Coweta Realty Company, a partnership composed of Ellis H. Hammett, R. C. Allen and J. C. Pinson, Plaintiffs, *vs.* Marchie Tiger, Defendant—Petition in error—Allen & Pinson and Roach & Bradley, Muskogee, Okla., Attorneys for plaintiffs in error.

25 & 26 In the District Court of Oklahoma, Muskogee County.

(Transferred from the United States Court for the Western District of the Indian Territory—William R. Lawrence, Judge.)

MARCHIE TIGER, Plaintiff,

vs.

WESTERN INVESTMENT COMPANY, a Corporation; ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners Doing Business under the Firm Name and Style of The Coweta Realty Company, Defendants.

Bill in Equity to Remove Cloud on Title.

Transcript of the Record.

Be it remembered:

That on September 11, 1907, the plaintiff filed his complaint against the defendants in the United States Court for the Western District of the Indian Territory, sitting in equity at Muskogee, as follows, to wit:

(Caption Omitted.)

"To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, in chancery sitting:

The plaintiff, Marchie Tiger, for cause of action against the defendants, Western Investment Co., Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners, doing business under the firm name and style of The Coweta Realty Company, respectfully represents unto this Honorable Court:

I.

That the plaintiff and defendants reside within the Western District of the Indian Territory and that Muskogee is the nearest Court town to the residents of the parties to this suit.

27 II.

Plaintiff further alleges that he is the owner in fee simple and in possession of the South Half of Section Twenty-one (21) Township Eighteen (18) North, Range Sixteen (16) East, being the lands allotted to Sam Tiger and Martha Tiger, deceased.

III.

The plaintiff further alleges that he is the owner in fee simpl
in possession of the East Half of the Southwest quarter an
Northwest quarter of the Southeast quarter of Section Twent
(25) Township Eighteen (18) North, Range Sixteen (16) E
the Creek Nation, Indian Territory, and that he became such
of this land on the 17th day of November, 1903, by a deed o
veyance from the Creek Nation by P. Porter, Principal Chief.

IV.

The plaintiff further alleges that on the — day of ———
the Creek Nation conveyed to Sam & Martha Tiger the South
of Section Twenty-one (21), Township Eighteen (18) North,
Sixteen (16) East and that on the 6th day of May, 1903, by a
of conveyance the Creek Nation con-eyed to Lydia Tiger the N
west quarter of Section Twenty-one (21) Township Eighteen
North, Range Sixteen (16) East, Creek Nation, Indian Terr
and that on the 4th day of April, 1903, the Creek Nation con
to Louisa Tiger the Southwest quarter of Section Fifteen
Township Eighteen (18) North, Range Sixteen (16) East,
Nation; that during the year 1903, the said Sam, Martha,
and Louisa Tiger died intestate in the Creek Nation, Western
trict of the Indian Territory, seized and possessed of said land
leaving the plaintiff their sole and only heir at law in whom th
to their lands might or could vest and that the plain
28 now the owner and in possession of said land.

V.

The plaintiff further alleges that he is a citizen of the
Nation and has arrived at the full age of twenty-three years.

VI.

Further complaining the plaintiff says that on the following
to wit, August 8, 1907, he sold and conveyed by warranty dee
South Half of Section Twenty-one (21) Township Eighteen
North, Range Sixteen (16) East to the Western Investment
pany, a corporation, of Coweta, for the consideration of $2,0
of which has been paid to the plaintiff.

VII.

Further complaining the plaintiff says that on the following
to wit: July 1, 1907, July 26, 1907, Aug. 8, 1907, and Au
1907, he sold and conveyed by warranty deed all of the lands
described as allotments of Lydia and Louisa Tiger unto the d
ants for a consideration of $3000, $858 of which considerati
defendants have paid.

VIII.

Further complaining the plaintiff says that the land descri
allotments of Marchie Tiger is a part of the lands allotted to hi
full-blood citizen of the Creek Nation and that he is duly enro

such; that his restrictions against the alienation of said lands have been continued for a period of twenty-five years from April 26, 1906, by an Act of Congress approved April 26, 1906, (34 Stat. L. 137) Sec. 19 of which provides:

29 'That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall prior to the expiration of said period, be removed by Act of Congress.'

IX.

Further complaining the plaintiff says that said lands allotted to Sam, Martha, Lydia and Louisa Tiger and inherited by the plaintiff were sold and conveyed to the defendants without the approval of the Secretary of the Interior; that by Sec. 22, an act of April 26, 1906, which provides that all deeds made by heirs, who are full bloods, are to be subject to the approval of the Secretary of the Interior, he is *to be subject to the approval of the Secretary of the Interior, he is* not authorized to make deed of conveyance of his inherited lands without such approval and that the sales so made by the plaintiff to the defendants were void and of no effect and that the deeds herein recited ought to be cancelled, set aside and held for naught.

X.

Plaintiff alleges that said deeds are clouds upon his title and encumbers the same to his damage.

XI.

Further complaining the plaintiff says that he has tendered to the defendant, The Coweta Re lty Company the sum of $558. paid to him on the purchase price of the allotments of Lydia and Louisa Tiger and has tendered to the Western Investment Company the sum of $2000 paid to him by the said company in payment of

30 the allotments of Sam and Martha Tiger and that they have failed and refused to accept his tender and that he here and now tenders the said sums in open court and asks that the same be made a lien upon the land.

Wherefore, premises considered, plaintiff prays that the said conveyances, as clouds upon his title, be removed; that the court decree that the attempted sales of said lands are null and void, and that the court decree a cancellation of said deeds and set aside said sales, and that the plaintiff recovers his costs herein, laid out and expended and for all proper relief.

J. J. HUGHES,
Att'y for Plaintiff."

UNITED STATES OF AMERICA,
Indian Territory, Western District:

Marchie Tiger, first being duly sworn, upon his oath says: That he is the plaintiff in the within and foregoing action; that he has heard

read and fully understands the foregoing complaint, and that the things and matters therein alleged are true, as he verily believes.

his
MARCHIE x TIGER.
mark.

Witness to mark:
J. J. HUGHES,
Coweta, I. T.
R. J. MINGO,
Coweta, I. T.

Subscribed and sworn to before me, a Notary Public within and for the Western District of the Indian Territory, on this the 3rd day of September, 1907.

R. J. MINGO,
Notary Public.

31 There is no summons in the record, but both defendants appear to have answered the complaint herein. The Coweta Realty Company filed its answer on September 11, 1907, as follows:

(Caption Omitted.)

"To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, in Chancery sitting:

The defendants, The Coweta Realty Company, for their answer to the complaint of the plaintiff say:

I.

That said defendants admit that this court has full and complete jurisdiction over the parties and subject matter of this action.

II.

The said defendants, in answer to paragraph three of plaintiff's complaint, say that they admit that Marchie Tiger became the owner of the East Half of the Southwest quarter and the Northwest quarter of the Southeast quarter of Section 25, Township 18 North, Range 16 East on the 17th day of November, 1903, but deny that he is now the owner of said lands.

III.

The said defendants, in answer to paragraph four of plaintiff's complaint, admits that Lydia Tiger and Louisa Tiger became the owners of the lands described as alleged in said complaint, but say that as to Marchie Tiger being their sole and only heir they have not sufficient knowledge or information to form a belief. Said defendants deny that the plaintiff is now the owner of said lands.

IV.

The said defendants, in answer to paragraph five of plaintiff's complaint, say that they admit that Marchie Tiger is a citizen of

32 the Creek Nation, but that as to the age of said plaintiff they have not sufficient knowledge or information to form a belief.

V.

The said defendants, in answer to paragraph eight of plaintiff's complaint, deny that Marchie Tiger is a full blood citizen of the Crek Nation, but admit that he is enrolled as such; deny that the Act of Congress, approved April 26, 1906, applies to said allotment, but say that the said Marchie Tiger acquired his allotment prior to the enactment of said law, and that his deed was executed to him subject to the Act of Congress approved June 30, 1902, by the terms of which his restrictions were removed on the 30th day of June, 1907.

VI.

The said defendants, in answer to paragraph nine of plaintiff's complaint, admit that the lands allotted to Lydia and Louisa Tiger were sold and conveyed to the defendants by Marchie Tiger without the approval of the Secretary of the Interior, but say that the same *was* sold after the expiration of the restriction period and that therefore the approval of the Secretary of the Interior was unnecessary; deny that the Act of Congress approved April 26, 1906, was ever intended to apply to inherited lands of full bloods, after June 30, 1907.

VII.

The said defendants, in answer to paragraph eleven of plaintiff's complaint, admits that they purchased the lands allotted to Marchie Tiger, Lydia Tiger and Louisa Tiger, as alleged in plaintiff's complaint, for a consideration of Three Thousand Dollars, and say that they agreed to pay the said Marchie Tiger the sum of $1,000 each for the three tracts when a court of competent jurisdiction holds that the deeds executed to said defendants conveyed a good and merchantable title, copies of which contracts are herewith filed, marked
33 exhibits "1," "2," and "3," and made a part of this complaint; that the defendants have paid the said Marchie Tiger $858 of said purchase price, a copy of receipt of which is herewith filed, marked exhibit "4," and made a part of this complaint (answer); that said sum was paid in part payment of deceased allotments hereinbefore described; that defendants have paid $18 of the purchase price of the allotment of Marchie Tiger.

Further answering the defendants say that they are the owners in fee simple of the lands in this answer described, and that they became the owners thereof by purchase from Marchie Tiger, as evidenced by deeds hereto attached, marked exhibits "A" "B," "C" "D" "E" and "F" and made a part of this complaint (answer).

Wherefore, premises considered, the defendants pray that the Court decree the title to said lands in them; for costs and other proper relief.

ALLEN & PINSON,
Attorneys for The Coweta Realty Company.

J. C. Pinson, first being duly sworn, says that he is one of the defendants above named; that he has read the foregoing answer, and that the things and matters therein stated he believes to be true.

J. C. PINSON.

Subscribed and sworn to before me this September 9, 1907.

[SEAL.] C. E. KILLMER,
Notary Public.

My commission expires June 13, 1908."

34 That the defendant, Western Investment Company, filed its separate answer herein on September 11, 1907, as follows:

(Caption Omitted.)

"To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, in Chancery sitting:

The defendant, Western Investment Company, answering the complaint of the plaintiff, Marchie Tiger, says:

I.

That the said defendant admits that this court has full and complete jurisdiction over the parties and subject-matter of this action.

II.

The said defendant, in answer to paragraph two of plaintiff's complaint, denies that the plaintiff is the owner of the South Half of Section Twenty-one (21) Township Eighteen (18) North, Range Sixteen (16) East, but alleges that the said defendant is the owner of said lands by virtue of a purchase of same from Marchie Tiger.

III.

The said defendant, in answer to paragraph four of plaintiff's complaint, admits that during the year 1903, the Creek Nation conveyed to Sam and Martha the above described lands; that as to Marchie Tiger being the sole and only heir at law of said Sam and Martha Tiger the defendant has not sufficient knowledge or information to form a belief; that said defendant denies that Marchie Tiger is now the owner of said lands.

35 IV.

Said defendant, in answer to paragraph six of plaintiff's complaint, says that it admits the execution of the said deed to Western Investment Company August 8, 1907.

V.

Said defendant, in answer to paragraph nine of plaintiff's complaint, admits that the deed executed by Marchie Tiger to the Western Investment Company was never approved by the Secretary of

the Interior, and says that under the law the said deed conveyed a good title without such approval.

Wherefore, premises considered, the defendant prays that the title to said lands be decreed to it; for costs and other relief.

ALLEN & PINSON,
Attorneys for Defendant.

B. A. Brunson, first being duly sworn upon oath says that he is the manager of the Western Investment Company; that he has read the foregoing answer, and that the things and matters therein contained he believes to be true.

B. A. BRUNSON.

Subscribed and sworn to before me this September 9, 1907.

[SEAL.] C. E. KILLMER,
Notary Public.

My commission expires June 13, 1908.

On September 23, 1907, the parties filed a stipulation in open court (which is missing from the files of this court) by which the parties agreed that the only questions at issue in said action were the age of the plaintiff, Marchie Tiger, and his right to sell and convey the lands described in his complaint on the 8th and 13th of August, 1907. This more clearly appears by reference to Paragraph II of the Report of the Master in Chancery, Hon. A. A. Davidson,
36 to whom the cause was referred for hearing and report of findings and conclusions by journal entry order of reference made by the court.

In pursuance of such order of reference this cause was heard by A. A. Davidson, Master in Chancery on October 3, 1907, and his report, with findings and conclusions, was filed October 5, 1907, as follows, to wit:

(Caption Omitted.)

"*Report of the Master in Chancery.*

To the Honorable William R. Lawrence, Judge of said Court:

I, A. A. Davidson, Master in Chancery, do respectfully report that pursuant to the order of reference herein and by agreement of the parties, I was attended at my office in Muskogee, Indian Territory, on October 3, 1907, by J. J. Hughes, attorney for the plaintiff, and by R. C. Allen, of Allen & Pinson, attorneys for the defendants; that Dave Tiger, John Folutka and Neosho Tiger were sworn as witnesses, who each testified as stated in the report of evidence herewith attached and made a part of this report.

From the evidence introduced, and from an examination of the pleadings and records herein, I find:

I.

That this cause was instituted on September 11th, 1907, by the filing of a complaint by the plaintiff praying that certain deeds of

conveyance executed by him be set aside, and on the same day defendants filed their separate answers to the complaint;

II.

That on September 23rd, 1907, the parties filed in open court a stipulation agreeing that the only matters in controversy
36½ were the age of the plaintiff and his right to sell and convey the lands described in his complaint;

III.

At the conclusion of the hearing the defendants, by their counsel, stated that they made no claim to the East Half of the southwest quarter and the Northwest quarter of the Southeast quarter of Section 25, Township 18 North, Range 16 East. As a matter of fact, I find no allegation in the complaint that such lands were sold or conveyed by the plaintiff, and therefore such lands do not appear to be involved in this controversy.

IV.

That the plaintiff is a citizen of the Creek Nation and duly enrolled as a full blood;

V.

That the lands in controversy are as follows, to wit:

(*a*) The Southeast quarter of Section 21, Township 18 North, Range 16 East, being the allotment of one Martha Tiger, a full blood Creek citizen, to which lands patent was issued in 1903;

(*b*) The Southwest quarter of Section 21, Township 18 North, Range 16 East, being the allotment of one Sam Tiger, a full blood Creek citizen, to which lands patent was issued in 1903;

(*c*) The Northwest quarter of Section 21, Township 18 North, Range 16 East, being the allotment of one Lydia Tiger, a full blood Creek citizen, to which lands patent was issued on May 6th, 1903;

37 (*d*) The Southwest quarter of Section 15, Township 18 North, Range 16 East, being the allotment of one Louisa Tiger, a full blood Creek citizen, to which lands patent was issued on April 3rd, 1903;

VI.

That the said Sam, Martha, Lydia and Louisa Tiger died during the year 1903, and it is agreed by the parties to this suit that the plaintiff is the sole and only heir at law of the said decedents and succeeds to the title and possession of the above described lands;

VII.

That on August 8th, 1907, the plaintiff sold and conveyed by warranty deed to the defendant, Western Investment Company, the allotments of Sam and Martha Tiger, to wit, the South Half of Section 21, Township 18 North, Range 16 East for the sum of $2,000, all of which consideration has been paid;

VIII.

That on July 1st, 1907, the plaintiff, for a valuable consideration, sold and conveyed by warranty deed to the defendant, Coweta Realty Company, the allotments of Lydia and Louisa Tiger, to wit: The Northwest quarter of Section 21, Township 16 North, Range 16 East and the Southwest quarter of Section 15, Township 18 North, Range 16 East; that on each of the following days, to wit, on July 26th, 1907, August 8, 1907, and August 13th, 1907, he made like transfers of the said lands to the said defendant, Coweta Realty Company; that the full consideration for such conveyances was $3,000, of which $558 has been paid;

IX.

That each of the above mentioned conveyances was made and executed by the plaintiff without the approval of the Secretary of the Interior;

38

X.

That at the time of the execution of the various deeds and instruments of conveyance the plaintiff was over twenty-one years of age.

XI.

That the plaintiff has offered to return to the defendant, Coweta Realty Company, the sum of $558, and has made a tender thereof which has been refused; that he has offered to return to the Western Investment Company the consideration paid by them, to wit, $2,000, and has made a tender thereof, which tender has been refused.

This suit was brought by the plaintiff to declare null and void his conveyances of said lands and to have the various deeds executed by him thereto set aside as clouds upon his title, for the reason that he was without power to so alienate said lands.

Section 16 of the Supplemental Creek Agreement which was ratified by an Act of Congress approved June 30th, 1902, and by the Creek National Council on July 26th, 1902, provides:

'Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.'

39 This section was a substitute for Section 7 of the original Creek Agreement ratified by an Act of Congress approved March 1, 1901, and by the Creek Nation on May 25th, 1901, which provides:

'Lands allotted to citizens hereunder shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or

satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from incumbrance of any kind whatever for twenty-one years, for which he shall have a separate deed, conditioned as above.'

It is perfectly clear that under the law quoted neither the allottees of the lands described, nor their heir, the plaintiff could dispose of such lands until the expiration of five years from the date of the approval of the Supplemental Agreement of 1902, and it is equally clear that after the expiration of such period such lands became alienable as a necessary incident to the title, unless, prior thereto, further restrictions against their alienation had been imposed by law. Such further restrictions, the plaintiff contends, were imposed by Section 19 of the Act of Congress approved April 26th, 1906, which provides:

'That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under the rules and regulations; Provided, further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereina*ble* provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.'

The restrictions imposed by this section, which is known as the McCumber Amendment, appear to apply only to full bloods of the

various tribes as allottees and to the lands allotted to them, and not to lands which they had acquired by descent, or otherwise than by allotment. The restrictions against alienation imposed by
41 both of the Creek Agreements were placed not only upon the allottee but upon his heirs. In the law just quoted the word "heir" does not occur, and from the language employed, the twenty-five years restrictions must be considered as intended by Congress to be personal to the allottee and to involve only the lands allotted to him as his share of the Creek domain.

It is also claimed by the plaintiff that all conveyances by full blood heirs are subject to the approval of the Secretary of the Interior under the provisions of Section 22 of the Act of Congress referred to which are as follows:

'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.'

Up to the expiration of the restrictive period fixed by the Creek Agreement of 1902, the heirs of deceased Indians could sell lands inherited from such decedents only by virtue of the provisions of the Act of 1906, and such conveyances were subject to the approval of the Secretary of the Interior. After the five years' restrictive
42 period had expired, however, allotted lands became alienable by the allottee and by his heirs, except as heretofore stated, in the case of full bloods with reference to their personal allotments. If the conveyances in this case were made by the plaintiff after the expiration of the five years' restrictive period then such conveyances were made, not under the provisions of the Act of 1906, but by virtue of the power of alienation incident to a fee simple title, which power of alienation was no longer restricted, having only been temporarily suspended by the provisions of the agreement of 1902.

I am of the opinion, as expressed, with my reasons therefor, in my reports heretofore filed *in re* Lee Burgess *v.* Ellis H. Hammett *et al.*, and also J. N. Baker *v.* Ellis Hammett *et al.*, that the five years' restrictive period within which allotted Creek lands were inalienable, expired on July 26, 1907, and that the first deed executed by the plaintiff subsequent to that date made in good faith and for a valuable consideration was sufficient to pass title, upon the execution and delivery thereof, to the grantee.

My conclusions in the premises, therefore, are:

1st.

That the restrictions imposed by Section 19 of the Act of Congress approved April 26th, 1906, against the alienation by full blood Indians of the Five Civilized Tribes, of the lands allotted to them are personal and do not apply to conveyances of inherited lands made by full blood heirs;

2nd.

That under the provisions of Section 22 of said Act of Congress the plaintiff's deeds to his inherited lands executed by him prior to July 27th, 1907, were not effective to pass title without the approval of the Secretary of the Interior;

43 3rd.

That the deed executed by the plaintiff on August 8th, 1907, conveying the South Half of Section 21, Township 18 North, Range 16 East to the Western Investment Company, and the deeds executed by the plaintiff on August 8th, 1907, and on August 13th, 1907, conveying to the Coweta Realty Company the Northwest quarter of Section 21, Township 18 North, Range 16 East and the Southwest quarter of Section 15, Township 18 North, Range 16 East, having been made after the expiration of the five years' restrictive period, do not come within the provisions of the Act of Congress approved April 26th, 1906, and were, without the approval of the Secretary of the Interior valid and effective conveyances of the plaintiff's right, title and interest in the lands therein described.

Wherefore, in accordance with the above findings and with the stipulation and agreement of the parties, I recommend that as to the plaintiff's conveyances of his inherited lands, his prayer for relief be denied and the complaint dismissed for want of equity.

Respectfully submitted,

(Sgd.) A. A. DAVIDSON,
Master in Chancery.

Dated at Muskogee this 4th day of October, A. D. 1907.

On October 5, 1907, the plaintiff filed in this court his waiver of the right to file exceptions to the Master's Report before the Master in Chancery, as follows:

44 (Caption Omitted.)

"Whereas, the above styled action was this day heard before Honorable A. A. Davidson, Master in Chancery, upon an order of reference made by Honorable William R. Lawrence, Judge, and

Whereas, the said Master has decided the issues in favor of the defendants.

Now, therefore, I, J. J. Hughes, Attorney for the plaintiff, hereby

waive time, and agree that the report of the Master may be filed with the Court as soon as prepared.

Witness my hand this October 3, 1907.

(Sgd.) J. J. HUGHES,
Attorney for Plaintiff.

That on November 4, 1907, the Court made the following journal entry in open court:

Master's report not confirmed; his findings of fact and conclusions of law are set aside and disaffirmed, and the Court finds in favor of the plaintiff, and orders, adjudges and decrees that upon the refunding to defendants and each of them the money received from the several conveyances, with interest at 6% per annum, from date of receipt, that defendants shall reconvey the lands in question to said plaintiff, and upon failure so to do, the conveyance shall be made by the Master in Chancery of this Court, the defendants to pay the costs as per decree entered," to the rendition of which judgment the defendants then and there excepted.

That on November 6, 1907, the Court made the following journal entry in open Court:

"The Court upon its own motion, notice thereof having been given R. C. Allen, attorney for defendants, in open court this day, modified order herein made November 4, 1907, in that 'upon the refunding to defendants and each of them the money received from the several conveyances, with interest at 6% per annum, from
45 date of receipt' be stricken from said order, to the rendition of which defendants then and there excepted."

The Court then and there entered the following decree:

(Caption Omitted.)

"This cause coming on to be finally heard on this 6th day of November, 1907, upon the pleadings, report of Master in Chancery, A. A. Davidson, to whom this cause was referred to take evidence and report his findings of fact and conclusions of law, stipulations, briefs and arguments of counsel, and the Court being fully advised in the premises, doth find:

That the plaintiff, Marchie Tiger, is a full blood Indian citizen of the Creek Nation; that he had arrived at the full age of twenty-one years prior to the 8th of August, 1907; that he is the sole heir of Sam, Martha, Lydia and Louisa Tiger; that the said Sam, Martha, Lydia and Louisa Tiger died intestate in the Western District of the Indian Territory, prior to April 26, 1906, seized and possessed of their share of the lands of the Creek Nation, to which tribe of Indians they belonged; that on the 8th day of August, 1907, and 13th day of August, 1907, the said Marchie Tiger, as the sole heir of Lydia and Louisa Tiger, sold and conveyed to Ellis H. Hammett, R. C. Allen and J. C. Pinsen, co-partners, doing business under the firm name and style of The Coweta Realty Company, the allotments of Lydia and Louisa Tiger, as described in the complaint and answer herein; that on the 8th day of August, 1907, Marchie Tiger, as the

sole heir of Sam and Martha Tiger, conveyed to the Western Investment Company the said allotments of Sam and Martha Tiger, described in the complaint and answer herein; that the Western Investment Company paid for the lands so purchased the sum of Two Thousand Dollars; that the Coweta Realty Company paid for the lands so purchased the sum of Eight Hundred and Fifty-five Dollars,
and agreed to pay an additional sum of Eleven Hundred
46 and Fifteen Dollars.

I further find that the restrictions upon the alienation of the lands described were not removed, and that the said deeds were not approved by the Secretary of the Interior.

It is therefore ordered, considered, adjudged and decreed that the prayer of plaintiff be allowed and that the defendants reconvey, by quit claim deed, to the plaintiff the said described lands within ten days from this date, and that upon failure to make said conveyance as aforesaid, it is ordered that the conveyance shall be made by the Master in Chancery of this Court, or Commissioner appointed by the Court.

It is further ordered that the costs of this action be adjudged against the defendants, for which execution may issue.

(Sgd.) WILLIAM R. LAWRENCE,
Judge of the United States Court for the Western District of the Indian Territory.

That thereafter and on November 15, 1907, defendants filed in this court their Assignment of Errors, as follows, to wit:

In the United States Court of Appeals for the Indian Territory.

WESTERN INVESTMENT COMPANY, a Corporation, ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners, doing Business under the Firm Name and Style of The Coweta Realty Company, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

Assignment of Errors.

Comes now the Western Investment Company and The Coweta Realty Company, Plaintiffs in error, in the above entitled cause, and say that in the foregoing record and proceedings there is manifest error in the action and rulings of the United States Court for the Western District of the Indian Territory, in this, to wit:

47 I.

The Court erred in refusing to confirm the report of A. A. Davidson, Master in Chancery, to whom this cause was referred by the Court to take evidence and report findings of fact and conclusions of law, which report is as follows:

(Here follows the Master's Report in full, for which see page 7, 8, 9, 10 & 11 hereof.)

II.

The Court erred in making the following entry upon his docket on the 4th day of November, 1907, to wit:

(Here follows the journal entry set forth on page 12 hereof.)

III.

The Court erred in entering upon his docket on the 6th day of November, 1907, without sufficient notice being first given the defendants of an intention to reform his former decree the following judgment, to wit:

(Here follows the journal entry set forth on page 12 hereof.)

IV.

The Court erred in finding that the deeds executed by Marchie Tiger to the Western Investment Company and the Coweta Realty Co., after August 8, 1907, were not valid and effective conveyances of all his right, title and interest in and to the lands they described.

V.

The Court erred in entering the following decree for the plaintiff, defendant in error, to wit:

(Here follows in full the decree of the Court set forth herein at pages 12 & 13.)

Wherefore, and for divers other errors and reasons apparent on the face of the record, the Western Investment Company and The Coweta Realty Company, plaintiffs in error, pray that the said proceedings as well as the judgment of the United States Court
48 for the Western District of the Indian Territory, be reversed.

(Sgd.) ROACH & BRADLEY,
ALLEN & PINSON,
Attorneys for Plaintiff in Error.

That, on November 15, 1907, the plaintiffs in error filed in this court their petition for Writ of Error, as follows:

(Caption Omitted.)

Petition for Writ of Error.

Your petitioners, Western Investment Company and the Coweta Realty Company, plaintiffs in error, respectfully show that the said above entitled cause is now pending in the United States Court for the Western District of the Indian Territory, at Muskogee, and that a judgment has been herein rendered in favor of the defendant in error, wherein it is adjudged that the plaintiffs in error did not acquire absolute title to the allotments of Sam, Martha, Louisa, and Lydia Tiger, deceased, inherited by Marchie Tiger, defendant in error, by virtue of certain deeds set out in the pleadings, and that the defendant in error have and recover of and from the plaintiffs in error all costs laid out and expended.

And your petitioners feel that they are aggrieved by the rendition of said judgment, pray that a writ of error be allowed in the above entitled cause, directing the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, to send up the record and proceedings with all things concerning the same to the United States Court of Appeals for the Indian Territory, in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error, may be reviewed and if error be found corrected according to the laws and customs of the United States.

ROACH & BRADLEY,
ALLEN & PINSON,
Attorneys for Plaintiffs in Error.

Allowed Nov. 6th, 1907.
WILLIAM R. LAWRENCE,
Justice United States Court of Appeals for Indian Territory.

49 On November 15, 1907, the plaintiffs in error filed in this Court their cost bond, as follows:

(Caption Omitted.)

Cost Bond.

Know all men by these presents, that we, the Western Investment Company and Ellis H. Hammett, R. C. Allen and J. C. Pinson, as principals, and B. A. Brunson and C. E. Trumbo, as sureties, are held and firmly bound unto Marchie Tiger in the full and just sum of Five Hundred Dollars, to be paid unto the said Marchie Tiger, his heirs, executors and administrators and assigns for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 6th day of November, A. D. 1907.

Whereas lately at the October Term, 1907, of the United States Court for the Western District of the Indian Territory, at Muskogee, in a suit pending in said court between Marchie Tiger, plaintiff, and Western Investment Company *et al.*, defendants, judgment was rendered against the defendants for costs and the said defendants having obtained a writ of error in the United States Court of Appeals for the Indian Territory, to reverse the judgment in aforesaid suit and a citation citing and admonishing them to appear in the United States Court of Appeals for the Indian Territory, sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said defendants shall prosecute said writ of error to effect and answer

all costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

(Sgd.) THE WESTERN INVESTMENT COMPANY,
By ALLEN & PINSON, *Its Attorneys.*

ELLIS H. HAMMETT.
R. C. ALLEN.
J. C. PINSON.
B. A. BRUNSON.
C. E. TRUMBO.

50 Approved Nov. 6th, 1907.

WILLIAM R. LAWRENCE,
Associate Justice U. S. Court of Appeals.

STATE OF OKLAHOMA,
- Muskogee County, ss:

I, Tony Matney, Clerk of the District Court for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal this 27th day of December, 1907.

[SEAL.]

TONY MATNEY, *Clerk*,
By E. A. COKER, *Deputy.*

Filed Dec. 30, 1907.

W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed on back as follows: No. 30—District Court of Oklahoma, Muskogee County—Marchie Tiger, Plaintiff *vs.* Western Investment Company and The Coweta Realty Company, *et al.*, Defendants—Petition in error and Transcript—Filed Dec. 30, 1907, W. H. L. Campbell, Clerk Supreme Court, By Jessie Pardoe, Deputy—Allen & Pinson and Roach & Bradley, Muskogee, Okla., Attorneys for defendants, plaintiffs in error.

51 Thereafter, at the November Term, 1907, on the eleventh day of April, 1908, the following proceedings were had in said cause, to wit:

30.

WESTERN INVESTMENT COMPANY, a Corporation, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

Ordered by the Court, that this cause be set for hearing for May 16, 1908.

52 And afterward, at the May, 1908, Term of said Supreme Court, on the sixteenth day of May, 1908, the following proceeding was had in said cause, to wit:

30.

WESTERN INVESTMENT COMPANY ET AL., Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

And now this cause is orally argued by counsel, and cause is submitted on the record, brief and oral argument herein.

53 And afterward, at the May, 1908, Term of said Supreme Court, on the twenty-sixth day of June, 1908, the following proceeding was had in said cause, to wit:

30.

WESTERN INVESTMENT COMPANY, a Corporation, *et al.*, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

And now this cause comes on for final decision and determination by the court, upon the record and briefs submitted herein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court should be reversed and the case remanded with instructions to dismiss.

It is therefore ordered and adjudged by the court, that the judgment of the lower court, be and the same is hereby reversed and the cause remanded with instructions to court below to dismiss.

Opinion by Hayes, J. All the Justices concur.

54 In the Supreme Court of the United States.

MARCHIE TIGER, Plaintiff in Error,

vs.

THE WESTERN INVESTMENT COMPANY, a Corporation, and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the Name of Coweta Realty Company, Defendants in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Western Investment Company, a corporation, and Ellis H. Hammett, R. C. Allen, and J. C. Pinson, co-partners under the name of Coweta Realty Company:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error

filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein Marchie Tiger was plaintiff in error and you are defendants in error, to show cause if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned, should not be corrected and why justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this 21st day of July, 1908.

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.

By W. M. BONNER, *Dep.*

[SEAL.]

55 *Service of Citation.*

We, the undersigned Attorneys of record in the above cause, hereby accept service of the foregoing Citation and acknowledge the receipt of a true copy thereof this 25 day of July, 1908.

ROACH & BRADLEY,
Attorneys for Ellis H. Hammett, R. C. Allen, and J. C. Pinson, as Coweta Realty Company, Defendants in Error.

We, the undersigned Attorneys of record in the above cause, hereby accept service of the foregoing Citation and acknowledge the receipt of a true copy thereof this 25 day of July, 1908.

GIBSON & RAMSEY,
Attorneys for Allen & Pinson, Defendants in Error.

We, the undersigned Attorneys of record in the above cause, hereby accept service of the foregoing Citation and acknowledge the receipt of a true copy thereof this 1 day of August, 1908.

ALLEN & PINSON,
Attorneys for The Coweta Realty Co., The Western Investment Co., Defendants in Error.

STATE OF OKLAHOMA,
County of Okmulgee, ss:

—— —— of lawful age being duly sworn upon his oath, states that he served the foregoing Citation by delivering a true copy thereof to —— —— —— —— Attorneys of record for —— —— on the — day of —— 1908.

(Signed) —— ——.

Subscribed and sworn to before me this — day of —— 1908.

—— ——

Notary Public.

My commission expires —— — —.

56 STATE OF OKLAHOMA,
County of Okmulgee, ss:

—— —— of lawful age being duly sworn upon his oath, states that he served the foregoing Citation by delivering a true copy thereof to —— —— —— —— Attorneys of record for —— —— on the — day of —— 1908.

(Signed) —— ——.

Subscribed and sworn to before me this — day of —— 1908.

—— ——

Notary Public.

My commission expires —— — —.

STATE OF OKLAHOMA,
County of Okmulgee, ss:

—— —— of lawful age being duly sworn upon his oath, states that he served the foregoing Citation by delivering a true copy thereof to —— —— —— —— Attorneys of record for —— —— on the — day of —— 1908.

(Signed) —— ——.

Subscribed and sworn to before me this — day of —— 1908.

—— ——

Notary Public.

My commission expires —— — —.

57 [Endorsed:] Equity No. 30. Marchie Tiger, Plaintiff in Error, *vs.* The Western Investment Company, a corporation, and Ellis H. Hammett, R. C. Allen, and J. C. Pinson, co-partners under the name of Coweta Realty Company, Defendants in Error. Citation. Filed Aug. 3, 1908. W. H. L. Campbell, Clerk Supreme Court.

58 No. 30.

In the Supreme Court of the State of Oklahoma, May Term, 1908.

Filed June 26, 1908.

WESTERN INVESTMENT COMPANY, a Corporation, and THE COWETA REALTY COMPANY, a Partnership Consisting of Ellis H. Hammett, R. C. Allen and J. C. Pinson, Plaintiffs in Error,

vs.

MARCHIE TIGER, Defendant in Error.

Syllabus.

1. An adult full-blood Creek Indian who, *after* five years after the approval of the Supplemental Creek Agreement, executed deeds without the approval of the Secretary of the Interior, conveying lands which had been allotted to certain of his relatives who were full-blood Creek Indians, and which had been inherited by him upon the death of such relatives, thereby conveyed a good title to his grantees.
2. Section 22 of Act of Congress, approved April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," does not extend beyond the time provided by section 16 of the Supplemental Creek Agreement, the restrictions upon the power of heirs who are full-blood Creek Indians to alienate their inherited lands.

Error from the Western District if the Indian Territory.

Wm. R. Lawrence, Trial Judge.

Reversed.

J. C. Stone, W. W. Wood, Gibson & Ramsey, and L. J. Roach.
Chris M. Bradley, R. C. Allen, and J. C. Pinson, for plaintiffs in error.
Judson J. Hughes, for defendant in error.

Opinion of the court by HAYES, *J.:*

This action was brought in the United States Court for the Western District of the Indian Territory at Muskogee, and trial had in that court shortly before the admission of the state into the Union, which resulted in a judgment for defendant in error, plaintiff below. Appeal from that judgment to this court has been perfected since the admission of the state.

59 Marchie Tiger, defendant in error (plaintiff below) is an enrolled full-blood Creek Indian, and is the sole heir at law of his deceased relatives, Sam Tiger, Martha Tiger, Lydia Tiger and Louisa Tiger, all of whom were enrolled as full-blood Creek Indians,

and who dies intestate during the year 1903, without issue, after having had allotted to them their respective allotments of land in the Creek Nation, consisting of 160 acres each, which allotments of land they owned at the time of their death and were inherited by Marchie Tiger. Marchie Tiger on the 8th day of August, 1907, conveyed the land so inherited by him from Sam Tiger, and Martha Tiger to the plaintiff in error, the Western Investment Company, and by a series of deeds on, respectively, July 1, 1907, July 26, 1907, August 8, 1907, and August 13, 1907, he conveyed the land inherited by him from Lydia and Louisa Tiger to the plaintiff in error, The Coweta Realty Company. He seeks by this action to have said deeds cancelled and the sales so made by him set aside, and the cloud formed upon his title by said conveyance removed.

Plaintiffs in error (defendants below) filed their separate answers, and the court referred the case to the Master in Chancery to take evidence and report his findings of fact and conclusions of law. The Master after taking the evidence, filed his report of findings of fact and conclusions of law, and recommended that the suit be dismissed for want of equity. The court set aside the Master's findings, both of law and of fact, and entered a decree in accordance with the prayer of plaintiff's petition. There is but little controversy, if any, about the facts. The findings of the Master and of the court as to the facts are, for the purposes of the questions of law involved in this case, the same, and are substantially as above stated.

60 The only proposition presented for our consideration by this appeal is whether a full-blood Creek Indian could, on the 8th day of August, 1907, convey lands inherited by him from his relatives who were full-blood Creek Indians, which lands had been allotted to his relatives as the portion of lands to which they were entitled as members of the Creek Tribe of Indians. In considering this proposition, it will be necessary for us to briefly review the treaties of the United States with the Creek Tribe of Indians and the laws of Congress leading up to and under which allotments of the lands of the Creek Nation have been made to the individual members of the Creek Tribe of Indians. The lands embraced within the Creek Nation were acquired by the United States by the Louisiana Purchase, and at one time were a part of the public domain of the United States.

On the 13th day of February, 1833, a treaty was concluded between the United States and the Creek Tribe of Indians by which the United States, in consideration of the Creek Tribe of Indians relinquishing their claims to certain lands previously occupied by them in Georgia, agreed to convey the lands within the limits of the Creek Nation to the Creek Tribe of Indians, which lands include the land in controversy in this case. Article three of that treaty provides:

"The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States,—and the right thus

guaranteed by the United States shall be continued to said Tribe of Indians so long as they shall exist as a Nation, and continue to occupy the country hereby assigned to them."

61 In compliance with this provision of the treaty, the United States, on August 11, 1852, conveyed said land to the Creek Nation by patent which contained a provision as follows:

"Now Know Ye, That the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee, or Creek Tribe of Indians, the tract of country above described. To have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

Since that time the Creek Tribe of Indians have occupied the lands so conveyed. About 1890 the United States government began to take steps looking to the dissolution of the ownership in common of the lands by the Five Civilized Tribes of Indians and to distribute and allot the same to the individual members of the tribe. On March 3, 1893, an Act was passed by Congress which provided:

"SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding 160 acres to any one individual within the limits of the country occupied by the Creeks; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States; and upon the allotment of the lands held by said tribe the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 of that Act provides for the appointment by the President of three commissioners to negotiate with the Creek Nation for

62 the purpose of extinguishing the tribal title to any of the lands held by the tribe and for the allotment and division of the same in severalty among the members of the tribe, and the Commissioners were authorized to make such agreement with the tribe as might be just and proper to accomplish this purpose and upon perfecting such agreement they were authorized to survey and designate the proper allotments. This Commission, commonly known as the Dawes Commission, was continued in existence by Acts of Congress of March 2, 1895, and of June 10, 1898. This commission on March 8, 1900, negotiated an agreement or treaty with the Creek Tribe, which was ratified and approved by an Act of Congress of March 1, 1901, and is commonly known as the Creek Agreement or Creek Treaty. Section three of this agreement reads:

"All lands of said tribe, except as herein provided, shall be allotted by said commission so as to give each an equal share of the whole in value."

Section 23 of this treaty provides how the allotments of land shall be conveyed to the allottees which in substance is that the principal chief shall execute and deliver to each Creek citizen, after he has selected his allotment, a deed conveying to the allottee all the right, title and interest of the Creek Nation and of all other citizens in and

to the lands embraced in the allottee's allotment certificate. It is provided that such conveyances shall be approved by the Secretary of the Interior, and that the approval of the Secretary of the Interior shall operate as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in the deed. By this treaty certain conditions and restrictions were imposed upon the lands allotted, but those provisions have been modified by subsequent agreements or Acts of Congress and will be stated later as modified and amended.

Section 16 of what is known as the Supplemental Creek agreement, passed on June 30, 1902, provides that "lands allotted to citizens shall not in any manner whatever or at any time be
63 encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior."

Under the provisions of the treaties and laws enacted by Congress herein set out, the deceased relatives of Marchie Tiger received their allotments of land in the Creek Nation.

It is agreed that the patents to the land in controversy to the respective allottees were executed by the Creek Nation, approved by the Secretary of the Interior, and delivered prior to the execution by Marchie Tiger of the deeds in controversy in this action. The land inherited by Marchie Tiger from his deceased relatives had, since 1852, belonged to the Creek Nation or Tribe of Indians by virtue of a patent from the United States, but the United States retained an interest in said land in the nature of a reversionary interest by the conditions contained in the patent which provided that the lands therein described should be the property of the said Tribe of Indians "so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

It is immaterial in this case whether the title to the lands in controversy became vested in the deceased relatives of Marchie Tiger at the time they were allotted to them or at the time the Creek Nation executed a patent approved by the Secretary of the Interior conveying said lands to said allottees, for the reason that it is agreed that both of these events had taken place prior to the time Marchie Tiger executed his deeds of conveyance to plaintiffs in error. He was at such time the owner of the fee simple title to all the lands conveyed by him to plaintiffs in error which title he had inherited from his deceased relatives without condition or restriction except the restriction imposed by section sixteen of the Supplemental Creek Agreement to the effect that the allottee nor his heirs should have the power to alienate an allotment until after the expiration of five years from the date of the approval of said agree-
64 ment.

Marchie Tiger inherited from his deceased relatives the same title to the land in controversy that they received from the Creek Nation, and the United States, which was a fee simple title, notwithstanding the conditions and restrictions upon the alienation

of the same for said period of five years. Libby *vs.* Clark, 118 U. S., 250; 30 L. Ed., 133; Schrimpscher *vs.* Stockton, 183 U. S., 290; Lykins *vs.* McGrath, 184 U. S., 169. In Schrimpscher *vs.* Stockton, *supra*, Mr. Justice Brown, in discussing this question, said:

"Here the United States had issued a patent to Rodgers 'and to his heirs and assigns, forever,' subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not rebound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

Upon the expiration of five years after the approval of the Supplemental Creek Agreement, containing section 16, *supra*, imposing the restrictions upon the alienation by the Creek Indian of his allotted lands, any such Creek Indian to whom allotment had been made would own the fee simple title to same without any restriction upon the alienation and would have the power to alienate the same. It has been repeatedly held by the Supreme Court of the United States that where the United States conveys property to an
65 Indian absolutely, without any condition or restriction upon its alienation, such Indian can dispose of the same and give good title to his grantee. Crews *vs.* Burchman, 1 Black, 352; Wilson *vs.* Wall., 6 Wall., 83; Pennock *vs.* Comm'rs., 103 U. S., 44; Elwood *vs.* Flannigan, 104 U. S., 563; Jones *vs.* Meehan, 175 U. S., 1.

The Supplemental Creek Agreement, containing said section 16, was ratified by the Creek Tribe of Indians on June 26, 1902, and proclaimed by the President of the United States on August 8, 1902; so whether we compute the time from the date of the ratification of the treaty by the tribe or from the date of the President's proclamation, five years had expired since such approval prior to the execution of the deeds by which Marchie Tiger, on August 8th and August 13, 1907, conveyed said land in controversy to plaintiffs in error. But it is contended by defendant in error that section 16 of the Supplemental Creek agreement had been amended and the restrictions upon the alienation of land by the allottee and his heirs provided in said section had been extended by the provisions of an Act of Congress passed April 26, 1906. Section 19 of said Act reads as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than

homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on ac-
66 count of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations; Provided, further, that conveyances heretofore made by members of any of the five civilized tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 20 provides how the allotments of land may be leased by full-blood allottees of the Five Civilized Tribes with the approval of the Secretary of the Interior, when the allottee is an adult and the lease is for a longer term than one year, or for the homestead, and that the allotment of minors may be leased under proper order of the court.

Section 21 provides that the allotment of a deceased allottee who died intestate without widow, heir or heirs or surviving spouce, if such facts be known to the Secretary of the Interior, shall revert to the tribe, and be disposed of in the manner provided, and if it be not known to the Secretary of the Interior, that such allotment shall escheat to the state.

67 Section 22 of said Act provides as follows:

"That the adult heirs of any deceased Indian of either of the five civilized tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

At the time of the passage of said Act of Congress, approved April 26, 1906, the deceased relatives of Marchie Tiger, if then living, or Marchie Tiger, if they were then deceased, could not have

coneveyd the lands in controversy for the reason that at that time five years had not expired since the approval of the Supplemental Creek Agreement, and the deceased relatives of Marchie Tiger in accepting deeds from the Creek Nation, approved by the Secretary of the Interior, accepted the same subject to the restrictions upon their power, and upon the power of their heirs in the event of their death, to alienate the land prior to the expiration of said five years without the approval of the Secretary of the Interior. It is contended that section 19 of said Act extends this restriction which had not expired as to the deceased relatives of Marchie Tiger, or
68 as to their adult heir, Marchie Tiger, at the time of its enactment. It is evident from the language of section 19 that Congress has undertaken to extend the restrictions on the power of the full-blood Indians of the Five Civilized Tribes to alienate, sell, dispose of or encumber the lands allotted to them, but we cannot conceive how the language of said section which undertakes to extend such restrictions could have been made plainer in its meaning. There is no ambiguity in the language and no construction of the same is required. The terms used should be taken and applied in their commonly accepted meaning. The language of the section is that "no full-blood Indians," not "no full-blood Indian or his heirs," "shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him," not "lands allotted to him or inherited by him," "for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress." The effect of this section, if valid upon which we do not at this time pass, is to disqualify the full-blood Indian from alienating or disposing of the lands allotted to him within said period of twenty-five years. The evident purpose of this provision was to deny for said period to certain Indians, to wit, the full-blood Indians, power to alienate or dispose of certain of his property, to wit, the lands allotted to him, not the lands inherited by him.

It is contended, secondly, that the restrictions imposed by said section sixteen of the Supplemental Creek Agreement are extended by the last sentence of section 22, of said Act which reads: "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."
69 We cannot concur in this contention. The first two sentences of section 22 have for their purpose and accomplish, subject to the limitations of the last sentence of the section, the removal of the restrictions upon adult heirs of any deceased Indian and authorized minor heirs, when there are both adult and minor heirs of a decedent, to joint in a sale of inherited lands by guardian duly appointed by the proper United States Court of the Indian Territory, and in case of the organization of a state then by the proper court of the state. The effect of these two sentences without the last sentence of the section would have been to repeal section 16 of the Suppelmental Creek Agreement in so far as it imposed a restriction upon the power of adult heirs to alienate inherited lands.

Without the last sentence of the section, Marchie Tiger, prior to the expiration of five years after the approval of the Supplemental Creek Agreement, could have conveyed the lands inherited by him from his deceased relatives, and could have given good title to his grantee without the approval of the Secretary of the Interior; but the last sentence of said section 22 is in the nature of an exception or proviso to the preceding section of the paragraph, and but for it, said section would have resulted in the removal of all restrictions as to adult Indian heirs, and such heirs would have had the power to convey their inherited lands without the approval of anyone being required, and does remove such restrictions as to all adult heirs of mixed blood. The first sentence of the section removes restrictions existing as to adult heirs within the five-year period following the approval of the supplemental Creek Agreement, and does not remove restric-
70 tions upon the alienation after such period for the reason that none existed. The adult heir after the expiration of said period of five years would have had the power to sell his inherited lands if the Act of April 26, 1906, had never been passed. The purpose of a proviso or an excepting clause is to except from the preceding part of the Act something that otherwise would have been embraced therein, or to in some manner modify that which has been embraced within the preceding part of the Act; and in construing a proviso or an excepting clause, the same should be construed with reference to the preceding part of the Act or clause to which it is attached and in the absence of language in the proviso or excepting clause giving it a more extended application than to the subject dealt with in the preceding clause or part of the section of the Act, it will be restricted to the subject dealt with therein. Lewis' Sutherland on Statutory Construction, paragraph 351 (2nd Ed.) McRae, Admr. *vs.* Holcomb, 46 Ark., 306; Bragg *vs.* Clark, 50 Ala., 364.

The only subject dealt with by the first part of section 22 is the right of adult heirs of any deceased Indian of either of the Five Civilized tribes to convey allotted lands. In other words, it was intended by the first sentence of said section to give to such adult heirs of deceased members of the Five Civilized tribes who had not theretofore had the right to convey their inherited lands to convey the same. As applied to the members of the Creek Tribe of Indians, the right to convey the lands had been denied the allottees and their heirs for said period of five years, except such conveyance be made with the approval of the Secretary of the Interior, and the effect of the first part of this section as to said Creek Tribe of Indians is to remove this restriction upon their power of alienation of their inherited lands, and it is to this general subject of legislation that the last sentence of the paragraph forms an exception or a proviso in so far as said Act applies to the Creek Tribe of Indians. Without it, any adult heir of the Creek Tribe of Indians could have
71 conveyed his inherited land prior to the expiration of said period of five years just as he could have conveyed it after the expiration of said period under section 16 of the Supplemental Creek Agreement, but by the last sentence a limitation was placed upon the

scope of the first sentences of the section to the extent that heirs who are full-blood Indians could convey only as had been provided by secion 16 of the Supplemental Creek Agreement, to wit, with the approval of the Secretary of the Interior. The effect of the first part of the section is to remove the restrictions upon the power of the adult heirs to sell prior to the expiration of five years from the ratification of the Supplemental Treaty, but it neither added to nor detracted from the right of such heirs to sell after the expiration of such five-year period for under their patent and the laws and treaties under which the patent had been issued to them, they would have had that right without further legislation, and if the last sentence of the section excepts something from the general effect of the language of the preceding sentences of the section, then it must except the right to convey within said period of five years from certain heirs, which it does when it provides that heirs who are full-blood Indians can convey only subject to the approval of the Secretary of the Interior, which leaves the law as to them just as it was prior to the passage of the Act of Congress, approved April 26, 1906. The deeds which Marchie Tiger executed were executed to plaintiffs in error subsequent to the expiration of said five-year period; he therefore conveyed to them a good title and the judgment of the trial court was error.

72 It has further been argued by the able counsel for plaintiff in error that if the effect of the provisions of the Act of April 26, 1906, had been to extend the restrictions on the power of the full-blood Indian- to sell their inherited lands for a period beyond the five years, provided in the Supplemental Creek Agreement, such Act would have been unconstitutional and void. Under the view we have taken of this case, it is not necessary for us to discuss this proposition, and we refrain from expressing any opinion thereon.

The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss plaintiff's petition.

Williams, C. J., Dunn, Turner and Kane, JJ., concurring.

73 UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that the foregoing 53 pages, numbered from one (1) to 53, both inclusive, are a full, true and complete transcript of all the pleadings, proceedings, and record entries in Cause No. 30, in which Marchie Tiger, was Defendant in Error, and Western Investment Company, a corporation, and the Coweta Realty Company, a partnership, composed of Ellis H. Hammett, R. C. Allen, and J. C. Pinson, were Plaintiffs in Eerror, in the above court, as fully as the same remain on file and of record in my office at the City of Guthrie, State of Oklahoma.

And, I further certify that the original writ of error with the clerk's return thereto and the original citation with the acceptance of service thereon and a copy of the opinion of the Supreme Court filed in said cause are each hereto attached and herewith returned.

In witness whereof, I hereunto set my hand officially and affix the seal of the said Supreme Court at Guthrie, this 13th day of August A. D. 1908.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 21,311. Oklahoma Supreme Court. Term No. 515. Marchie Tiger, plaintiff in error, *vs.* The Western Investment Company and Ellis H. Hammett, R. C. Allen, and J. C. Pinson, copartners under the name of Coweta Realty Company. Filed August 21st, 1908. File No. 21,311.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

MARCHIE TIGER, PLAINTIFF IN ERROR, *v.* THE WESTERN INVESTMENT COMPANY, et al.	No. 60.
WILLIAM BROWN AND LEVI B. GRITTS, on their own behalf, etc., appellants, *v.* THE UNITED STATES.	No. 331.
DAVID MUSKRAT AND J. HENRY DICK, on their own behalf, etc., appellants, *v.* THE UNITED STATES.	No. 330.

ADDITIONAL BRIEF FOR THE UNITED STATES ON THE MERITS.

This brief is not intended to supersede any of the contentions made by the Government in its principal briefs or in the oral argument. The purpose is to emphasize certain of these contentions, to

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answer more directly the points made by the appellants, and to call the court's attention to certain acts not heretofore fully discussed.

Of supreme importance is the duty of counsel for the Government to call the court's attention to the consequences that would follow a declaration that the acts of Congress here involved are unconstitutional. If the act of April 26, 1906, is found to be unconstitutional, it would seem that for the same reasons the act of May 27, 1908, must be declared unconstitutional, and possibly every other act of Congress passed since the so-called Citizenship Act of March 3, 1901. Such a declaration by the court will make thousands of incompetent full-blood Indians the prey of land speculators, and it will destroy a sovereign guardianship which Congress has exercised for more than a hundred years and has in this instance expressly shown an intention to continue. Of course, these considerations do not make constitutional acts which are unconstitutional, *but the very gravity of the consequences and the public nature of the calamity that would follow such a declaration suggests that Congress never intended by the acts relied upon by the appellants to emancipate these Indians from its control.*

The opinion and findings of the Court of Claims upon the helpless condition of these full-blood Indians and their incompetency to protect themselves appear in the record, and emphasize the remarkable situation which these cases present.

I.

The so-called Citizenship Act did not confer citizenship of any kind upon the Creeks or Cherokees, nor upon any members of the Five Tribes, except those who had taken up their residence apart from the tribe and adopted the habits of civilized life.

The so-called Citizenship Act of March 3, 1901, can not be construed to have applied to other members of the said tribes than those specified above without being construed to have applied to every member of said tribes, full blood included, despite the fact that he was a tribal Indian living on the unallotted land of the tribe. Certainly such a construction of the act is to be avoided if it is reasonably capable of any other construction. That it is reasonably capable of being construed as only applicable to the special class of Indians referred to in the heading of this point is fully shown in the Government's briefs. (No. 331, pp. 41–49; No. 330, pp. 34–36; No. 60, pp. 25–28.)

Additional reasons not heretofore fully presented by the Government exist for holding that the so-called Citizenship Act of March 3, 1901, can not be construed as having been intended to apply either to the Creek or Cherokee tribes. Two days before Congress passed the so-called Citizenship Act of March 3, 1901, Congress passed the Creek Allotment Act (c. 676, 31 Stat., 861, *et seq.*), the provisions of which fully define the status of those Indians to the United States. Therefore a general act dealing with all the Indians in the Indian Territory should not be taken

to have any reference to the status of Indians provided for in a special act of substantially the same date.

Likewise on March 1, 1901, Congress passed the Cherokee Allotment Act of March 1, 1901 (c. 675, 31 Stat., 848, 858, 861), in which it defined the status of the Cherokee Indians to the United States, and specifically provided for citizenship for said Indians. But the citizenship conferred was not to be inconsistent with the continued guardianship of the United States over the members of the tribe as tribal Indians. None of the provisions of the Cherokee Allotment Act of March 1, 1901, were to become binding upon the members of the tribe until ratified by the tribe, as prescribed in section 80 of the act. The act was never ratified by the tribe, and therefore did not go into effect. But, of course, the failure of the tribe to ratify the act does not affect the proposition that on March 3, 1901, when the so-called Citizenship Act was passed, Congress had just passed an act in reference to the members of the Cherokee Nation, dealing with them specially as to citizenship. Nor can the failure of the tribe to ratify the act take the case out of the well-known rule of law which prevents general provisions of law from being held applicable to subjects covered by special acts specifically dealing with them, especially where there is any ambiguity as to the meaning of the general provisions, or where there is a general class to which they may reasonably be held to apply.

Indeed, the fact that the Cherokee Allotment Act provided for citizenship and did not contemplate ratification until long after the so-called Citizenship Act of March 3, 1901, went into effect, makes it clear that Congress could not have intended it to defeat the special provisions provided for by the Cherokee Allotment Act of March 1, 1901. Consequently the rejection of the Cherokee Allotment Act by that tribe amounted to a refusal to accept citizenship. Further, the fact that the so-called Citizenship Act did not provide for its ratification by any of the Five Civilized Tribes strongly tends to show that it could not have been intended to apply to tribes whose relation to the United States was to be determined by the rejection or acceptance of special acts passed concerning them.

In this connection it should be recalled that United States citizenship is not an unmingled blessing to the members of an incompetent and uneducated race, nor a thing specially sought after by them. This circumstance, taken in connection with the fact that it has never been the custom of Congress to take any important steps in respect to the Five Civilized Tribes, without giving then a chance *in the first instance* to pass upon it, makes it exceedingly improbable that Congress should have taken such an important step in reference to the Creeks and Cherokees, for whom special provision was being made, without incorporating it in the acts pending before it at practically the date of the so-called Citizenship Act.

II.

If any citizenship was conferred it was not designed to emancipate the Indians concerned in this case from the peculiar guardianship which the United States was then exercising over them and their lands, but merely to give them an effective weapon to use against other parties than the United States.

The nature of the citizenship granted must, of course, be determined not merely by the words granting it, but also by the acts of Congress *in pari materia* passed at or about the same time. These acts show beyond question that no citizenship was granted which had the effect of relinquishing the Government's protection over the Indians' lands.

(*a*) On the very day that Congress passed the so-called Citizenship Act it passed another act concerning the Creeks and Cherokees authorizing the Secretary of the Interior to fix a time by agreement, not with the members of the tribe, but with the tribes themselves, for closing their rolls, and upon their failure to agree to any such time to fix the time without their consent. The same act also recognized the existence of the Creek and Cherokee tribes by requiring their resolutions to be approved by the President of the United States, in order to be of any validity. (Government's brief 330, pp. 37, 38.)

(*b*) Two days before that Congress had passed the original Creek Allotment Act continuing the peculiar relation of the Creek Indians to the United States. (Act of Mar. 1, 1901, c. 676, 31 Stat., 861, 872.) Section 46 of that act provided for a continuance of the

tribal government of the Creek Nation to March 4, 1906, "subject to such further legislation as Congress may deem proper." Section 1 of the same act provided for its ratification, not by the members of the tribe, but by the Creek national council, while section 43 promised the tribe special protection against the sale of intoxicating liquors. The two acts of March 1 and 3, 1901, were unquestionably pending in Congress at the same time, and it is therefore inconceivable that Congress intended the one to be construed without reference to the other. (Government's brief No. 60, pp. 28, 29.)

(*c*) Section 19 of the supplementary agreement with the Creek Nation (act of June 30, 1902, 32 Stat., 500, 504) contains a provision of vital significance as indicating the intimate relation which Congress conceived to exist between the continuance of the tribal government of the civilized tribes and its continued guardianship over them. The section provides in part as follows:

> * * * during the continuance of the tribal government the Secretary of the Interior * * * shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law.

This disposes of the constitutional questions involved in the Marchie Tiger case, since it can be supposed, in the face of such special provisions concerning the Creeks, that Congress ever intended to make them citizens of the United States in any sense of the word.

(*d*) If the acts referred to above indicate an intention on the part of Congress to continue as to the Creek Indians its peculiar guardianship over them and their property so long as their tribal government shall continue, it is impossible to conclude that the tribal government of the Cherokees and other tribes was continued for a purpose not sufficiently broad to include the retention of the same guardianship over them.

But aside from that, so far as the Cherokee Indians are concerned, the proposed act of March 1, 1901, not only, as has already been urged, conclusively shows that Congress never intended to confer any kind of citizenship upon the Cherokee Indians other than that specified in the act of that date, but also that Congress contemplated a continuance of its guardianship so long as their tribal government should continue. Therefore, even if the so-called Citizenship Act of March 3, 1901, could be construed as applicable to the Cherokee Indians, the citizenship conferred by it would clearly be limited by the provisions of the act of March 1, 1901, at least in so far as not clearly inconsistent therewith. The sections of the act of March 1, 1901 (31 Stat., 848, 858), pertinent to the present discussion are as follows:

> SEC. 58. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such future legislation as Congress may deem proper.
>
> SEC. 63. Each Cherokee citizen shall, on the date of the ratification of this agreement, be-

come a citizen of the United States and be entitled to all the rights and privileges thereof, but the same shall in no wise affect his rights as a member of said tribe.

SEC. 80. This agreement shall be binding upon the United States and on the Cherokee Nation * * * when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation * * *.

It is here to be noted that section 63 does not merely provide that the citizenship conferred shall not affect the right of any Indian to tribal or other property, as was the case with section 6 of the General Allotment Act, as amended by the so-called Citizenship Act, but expressly provides that the citizenship conferred shall not affect his right as a member of the tribe, *and that, too, in an act where Congress has expressly reserved the power to continue the tribal government for all purposes deemed proper by it.* To assume in the face of said provisions that the so-called Citizenship Act of March 3, 1901, was intended to confer citizenship upon the members of the Cherokee tribe, inconsistent with the power of Congress to continue its guardianship over them, would be to disregard the express intention of Congress.

(*e*) Besides, the special acts relating to the Cherokees and other tribes offer equally persuasive arguments in favor of the intention of Congress to continue its peculiar guardianship over them, at least so long as the tribal government shall continue.

(No. 331, pp. 63–66; No. 330, pp. 37, 38; No. 60, p. 31.) It has already been noted that Congress passed an act on the same day that it passed the so-called citizenship act authorizing the Secretary of the Interior to fix a time for closing the rolls by agreement with the Five Civilized Tribes, if possible, and upon their failure to agree to a time, to fix the time himself, and providing "that no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity unless approved by the President of the United States." (Act of Mar. 3, 1901, c. 832, 31 Stat., 1058, 1077.)

The Cherokee Allotment Act of July 1, 1902, under which the appellants claim title, not only continued the tribal government and provided for a ratification of the agreement by the tribe as such, but if the contention of the defendants in the *Muskrat and Dick* case, No. 330, be sound, it, too, violated the rights of full-fledged citizens of the United States by extending the time for closing the rolls, as fixed by Congress through the Secretary of the Interior, from July 1, 1902, to September 1, 1902.

The record does not show whether the appellants acquired their rights by virtue of that extension or not. If their contention be sound, their petitions should be dismissed, for they have failed to show that they are not themselves claiming title under an invalid grant.

In this connection it must be noted that appellants here contend, first, that the tribal government

of the Cherokee Indians was absolutely destroyed by the acts from 1889 to 1898, inclusive; second, that notwithstanding said destruction the lands did not revert to the United States; third, that the members of the Cherokee tribe thus became owners in common of the property in question; and, finally, that in 1901 they became citizens of the United States, free from all restraints except such as could be lawfully imposed upon all other citizens. If all these things are true, then every act of Congress respecting the disposition of their lands is unconstitutional, including the very act of July 1, 1902, under which they claim them. Certainly the ratification of the act of July 1, 1902, by a majority of the citizens of the tribe can not be taken to have given the act any validity if the members of the tribe were full-fledged citizens, just as white citizens are, and owned the property in common. If this be the case, the appellants have mistaken their remedy and *should bring suit for partition*, without reference to any action taken by Congress or by the officers of the United States.

III.

The restrictions upon alienation contained in the allotments under the act of July 1, 1902, should be construed as an indication of the intention of Congress to retain its guardianship over the Indians concerned.

In *United States* v. *Allen* (179 Fed., C. C. A., 13, 17, 19) Judge Amidon has recently considered the identical question here involved. The United States had brought suit on behalf of certain Indians of these

tribes to set aside conveyances made in violation of the restrictions against alienation contained in the act of April 26, 1906, as well as earlier acts. The Court says:

> Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the Government for the period of twenty-five years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the Government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the Government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887 is fully sustained in *United States* v. *Rickert* (188 U. S., 432). It is contended, however, in the present case, that that decision is not controlling, because there the Government held the legal title to the property for a period of twenty-five years in trust for the Indian, whereas here the legal title has been conveyed

> to the Indian, but subject to a restraint upon alienation. *The decision in the Rickert Case does not rest upon a principal of the law of real property, but upon the power of the nation to enforce its own measures.* [Our italics.]

It may be that the judgment in the *Rickert* case, 188 U. S. 432, could have been based upon narrower grounds than those stated by Mr. Justice Harlan, but it is difficult to see how one can read that opinion and in the face of its express language assume that the mere grant of citizenship, in and of itself, operates to destroy the Government's guardianship over the Indian and his property, or that, in reference to property rights, either sentence of section 6 of the General Allotment Act (still less the second sentence, under which the appellants must claim) was intended to confer all the incidents of full citizenship upon Indians, without regard to their competency.

For of Indians who had become citizens of the United States under section 6 of the General Allotment Act of 1887, Mr. Justice Harlan says: "These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. [Our italics.] They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To

tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.'"

It is impossible to see why the judgment of the court is based in part upon the continued wardship of the Indians, if it rested solely upon the retention of legal title by the United States. The above language unmistakably indicates that this court looked upon the retention of the legal title by the United States as not merely conferring on it the right of a property owner but as indicating an intention on the part of the Government, so far as property rights were concerned, not to emancipate the Indians from governmental control.

The debates in Congress which preceded the passage of the act of April 26, 1906, show beyond question that Congress then looked upon the provision against alienation contained in the so-called grants now under discussion as in the nature of a promise to the Indians that they would be permitted to alienate at the expiration of the period rather than as an ordinary condition in a grant and, in fact, conceived of it as an expression of its intention to retain control over the Indians as wards of the United

States during the restrictive period. (40 Cong. Rec., 4653–4655.)

The *Heff* case (197 U. S., 488), the *Celestine* case (215 U. S., 278), and the *Sutton* case (215 U. S., 291), instead of making against the interpretation which the Government has placed upon the *Rickert* case, support it. (Government's briefs No. 331, pp. 57–63; No. 33, pp. 39–45; No. 60, pp. 32–41.) The Government's interpretation of these cases is confirmed by the recent decision of the Circuit Court of Appeals for the Eighth Circuit, above referred to, to wit, *United States* v. *Allen* (179 Fed., 13–19). The opinion in that case upon this point is, in part, as follows:

> Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case (197 U. S., 488; 25 Sup. Ct., 506; 49 L. ed., 848). That decision, however, as now explained by the Supreme Court in *United States* v. *Celestine* (215 U. S., 278; 30 Sup. Ct., 93; 54 L. ed., ——), lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his

opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the State, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the Five Civilized Nations Congress has been at great pains to indicate a different purpose. Here it has from time to time, down to the organic act admitting Oklahoma and the provisions which it insisted should be embodied in the constitution of that State, reserved to itself express authority to pass such laws with respect both to the Indians and their lands as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this: In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the State. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present

case as in the former. (See, also, *U. S.* v. *Sutton*, 215 U. S., 291; 30 Sup. Ct., 116; 54 L. ed., ——.)

In *Wiggan* v. *Conolly* (163 U. S., 56, 57) the facts are that a treaty of July 28, 1862, provided that the members of a certain tribe of Indians five years from the date of the treaty should become citizens of the United States and subject to the laws of the United States and of the State wherein they might reside, and further provided that patents should issue to the members of the tribe. On or before March 30, 1906, a patent was issued to Esther Wilson, a girl under 21 years of age, wherein it was provided that she should not alienate or encumber the land until she became by the terms of the treaty a citizen of the United States. On February 23, 1867, an agreement was reached between the Indian tribe and certain commissioners on the part of the United States providing for important modifications of the provisions of the treaty, but this was not ratified by the Senate until June 18, 1868, and then with amendments in such important respects as to require subsequent ratification by the tribe. The treaty was not proclaimed until October 14, 1868 (15 Stat., 513).

Nevertheless, this court held that Esther Wilson's status as a citizen of the United States was destroyed by virtue of the tentative agreement between the tribe to which she belonged and the commissioners, subsequently ratified by the principals, and that

therefore her property could not be disposed of except in accordance with the terms of the later treaty, even though the disposition attempted was made under the direction of the court of the State in which the land was situated.

In other words, this court applied that most technical doctrine of the law, to wit, relation back by virtue of ratification, to destroy the citizenship of a person once a citizen of the United States, for not even by that legal fiction can it be denied that if any question had arisen as to her status during the period intervening between the tentative agreement entered into by the tribe and the commissioners and the subsequent ratification by the United States and the tribe, it must have been determined that she was in fact a citizen of the United States. This is demonstrated by virtue of the fact that if the tentative agreement never had been ratified, her citizenship, under the laws of the United States, would undoubtedly have dated from July 29, 1867. This court, therefore, went much further in the *Conolly* case than it is now asked to go in sustaining and continuing the peculiar guardianship of the United States over these Indians, even if they have some sort of citizenship. At least the case is a most weighty authority in favor of the view that except where Congress has distinctly declared to the contrary and where tribal relations have clearly ceased, the Indians are to be regarded by the courts as subject in a greater or less degree to the peculiar relations that have always affected their status.

IV

Treating these full-blood Indians as incompetent citizens of the Territory, Congress had the power to designate them as a class that needed special protection in the disposition of their property.

The principles upon which this contention is based are too well known to require elaborate discussion. The contention of the appellants that there is no analogy between the power exercised by the several States for the protection of the property of infants and other incompetents and the power which Congress is now attempting to exercise in regard to a most inexperienced and incompetent portion of a tribe, who as a class are utterly unfit to manage and dispose of their property, scarcely merits serious consideration. The Government has pointed out in its brief that the States have repeatedly extended the restrictions imposed upon children and other incompetents without providing any judicial machinery for determining whether each individual affected by the extension is in need of special protection. (Government's briefs, No. 331, pp. 69, 92; No. 60, pp. 42 to 51.) The very number of incompetent Indians affected necessitates and justifies their regulation as a class. Besides, Congress has, by the act of May 27, 1908 (Government's brief No. 331, pp. 15, 16), provided quasi judicial procedure for the removal of restrictions under such regulations and rules as the Secretary of the Interior may prescribe. It will be recalled that by virtue of a similar provision in a pre-

vious act, *Gritts has already had all of his restrictions removed as to surplus lands, and Brown has already had part of his restrictions removed.* (Rec., No. 331, p. 27.)

V.

The contention of the appellants that the Cherokee Indians have, since 1828, been the owners of the lands and funds of that tribe is unfounded.

As against the United States neither the tribe nor the members thereof, prior to the allotment of any land, ever had any interest in the lands or funds of the tribe which the United States was bound in anything except honor to respect.

The case of *Stephens* v. *Cherokee Nation* (174 U. S., 445, 478, 483) determined that whatever title the Cherokee Indians had in the lands and funds of the tribe was in the tribe, and not in the individual members thereof.

The case of *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 305, 307) determined that neither by the treaty of 1828, upon which the appellants now chiefly rely, nor by the treaties subsequent thereto was the tribe vested with such an interest in said lands and funds as to prevent the United States from disposing of the same contrary to the will of the tribe.

The case of *Wallace* v. *Adams* (204 U. S., 414, 415) determined that the power of Congress over the matter of enrollment in Indian tribes was plenary, and that if the result of one method was unsatisfactory to it, it could try another.

The case of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568) determined that the United States could alter the most important provisions of its treaty with the Comanche and other tribes of Indians, concerning the disposition of their unallotted lands, and that if injury was occasioned by the failure to give a *quid pro quo* for the property disposed of, Congress was the only body from whom relief could be sought.

The case of *Conley* v. *Ballinger* (216 U. S., 84–94) sustained the constitutionality of an act which provided for the disposal of the proceeds from the sale of the unallotted lands of a certain tribe as Congress saw fit, and, upon the authority of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 565), without any attempt to show that the lands occupied by the tribes concerned were granted under similar treaties, decided that the power of the United States over the unallotted lands of an Indian tribe is so complete as to free it from all legal obligations to the tribe. (Government's brief No. 330, 24–33.)

The irresistible conclusion to be drawn from all these cases is that no matter by what terms lands may be granted to an Indian tribe, neither the tribe nor the members thereof acquire any vested interest therein as against the supervisory power of the United States.

VI.

The contention that the act of June 28, 1898, completed the destruction of the tribal government of the Cherokee Nation, aside from being unsound, for reasons previously stated, proves too much, when taken in connection with other contentions made by the appellants.

Leaving out of view the fact that upon the destruction of the tribal government the lands would have, in accordance with the grant to the tribe, become the property of the United States, the above contention is inconsistent with another of appellants' contentions to the effect that the act of July 1, 1902, was passed in response to a request of the Cherokee council in 1901, made in pursuance of the treaty of 1886 with that nation, whereby it was provided "that whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for Cherokees to be surveyed and allotted among them at the expense of the United States."

If the Cherokee Nation was destroyed in 1898, how are we to suppose that a request was made by a council of that nation in 1901? Of course, the contention that the act of July 1, 1902, was passed in response to any such request or in pursuance thereof is utterly groundless as is also the contention that the tribal government ceased to exist in 1898. It is well known that from the moment statehood for Oklahoma was contemplated (which was before 1893)

Congress has pursued its own policy in reference to the disposition and allotment of the lands of the Five Civilized Tribes; that it has never occurred to it to heed the provisions in old treaties with those tribes; that whenever it has suited its purpose it has assumed and exercised the right of acting without the consent of the tribes. Moreover, an examination of the House document referred to as supporting this contention (H. R. Doc. No. 552, 57th Cong., 1st sess.) shows that the Secretary of the Interior advised Congress not to follow the request of the Cherokee council, but to divide the lands according to a bill proposed by him. A comparison of the so-called request of the Cherokee council and the bill prepared by the Secretary of the Interior with the bill actually passed by Congress will show that Congress did not follow either the request of the council or even the bill of the Secretary, but did exactly what it would have done if the Cherokee Nation had never said a word about it.

VII.

The Supreme Court cases cited by the appellants, with the exception of the Meehan and Heff cases, have nothing to do with the points at issue, and the Meehan and Heff cases, when properly construed, make for, not against, the contentions of the Government.

Concerning the cases cited by appellants little need be said. However, the Government desires to call the attention of the court to the following facts:

1. In not one of these cases has the power of Congress ever been denied to legislate for the protection of

the property of the Indians, either where there were no restrictions against alienation or where, if restrictions had ever existed, they had expired before Congress had exerted its power to further restrict alienation. Not only is this true, but the very cases which the appellants cite to support their contentions have assumed that the power thus to restrict the alienation of property while in the hands of the Indians existed in Congress, and have merely denied that Congress has the power after leaving the Indians free to dispose of their property, and after they had disposed of it under the power conferred upon them, to persons not Indians, *to deprive said third parties of their property by ex post facto laws.* (Government's brief No. 331, pp. 33–40; brief No. 60, p. 51.)

2. The briefs of the appellants contain many detached quotations, unaccompanied by any statement of the facts involved, in the several cases. If the facts had been stated, it would have been seen at once that the language quoted had no necessary bearing on the questions at issue in the present cases. Only one or two examples need be given of the misleading effect of these detached quotations.

At page 54 of the appellants' brief in No. 331 occurs the following statement: "It has been distinctly decided 'an Indian who is a citizen has the same rights and privileges as any other citizen.' (*U. S.* v. *Ritchie*, 17 Howard, 525, 539, 540.)"

In that case the general subject under consideration was the policy of the Spanish and Mexican Gov-

ernments to the Indians subject to their jurisdiction, a policy, of course, diametrically opposed to the policy of this country, as everyone knows who is at all familiar with Spanish and Mexican laws concerning the original inhabitants of the countries settled by the Spaniards. The particular point decided in that case was that, under the Mexican law in force at the date of the grant then under consideration, Solano, though an Indian, was as competent to take and to hold real estate *as any other Mexican citizen.*

At page 46 of the same brief, appellants quote at length from the case of *Schrimpscher* v. *Stockton* (183 U. S., 290, 299). There is nothing in this case which in the slightest way intimates that Congress has not the power to regulate the sale of Indian lands so long as they are in the hands of the Indians themselves. The case merely reaffirms the principles settled by the *Mechan* case, to wit, that in the absence of a provision to the contrary an Indian may sell land granted to him by the United States (or anybody else, for that matter), and that if the rights of third parties have not intervened the action of the Indian, under the power conferred upon him as to the disposition of his lands, is binding on all.

At no time has the Government contended that Congress has any power to set aside conveyances to third parties made by Indians under grants which contain no restrictions against alienation or whose restrictions have expired before conveyance at time when he was not forbidden by law to dispose of his lands. But this obviously has nothing to do with

the question of whether Congress can adopt a policy prohibiting the Indians from disposing of their property. Still less does it have anything to do with the power of Congress, while restrictions against alienation continue, to extend those restrictions.

VIII.

No objection on constitutional grounds can be made to the provision in the act of 1906 extending, for a limited purpose, the time previously fixed for closing the roll of the Cherokee Nation that does not apply with equal force to the provisions of the act of July 1, 1902, doing substantially the same thing under circumstances too identical for valid distinction.

The provisions of the act of July 1, 1902, under which the appellants must establish title, if at all, extended the time previously fixed by Congress, through the Secretary of the Interior, for closing the roll of the Cherokee Nation, after the Secretary of the Interior had, in accordance with the authority conferred upon him, fixed the time for closing the roll of that nation as of the date of July 1, 1902.

Section 74 of the act of July 1, 1902, expressly provides that the act shall not take effect until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation. Consequently, the act of July 1, 1902, did not go into effect until some time in August, 1902. Therefore, long before the act of July 1, 1902 took effect, the

time fixed by the Secretary of the Interior for closing the roll had expired.

It can not be claimed that the provision of the act of March 3, 1901, for closing the roll of the Cherokee Nation had any less binding effect upon Congress because made by the Secretary of the Interior, since it was done under authority expressly conferred upon him by Congress. (Government's brief No. 330, pp. 37, 38.) Nor can it be claimed that the act of July 1, 1902, was of any greater validity because ratified by a majority of the legal voters of the Cherokee Nation, since it is a mere act of Congress, notwithstanding that fact. (*Cherokee Intermarriage Cases*, 203 U. S., 76, 93; Government's brief No. 330, p. 50.)

CONCLUSIONS.

First, as to No. 60.

The judgment of the State court in the Marchie Tiger case should be reversed.

The intention of Congress to extend restrictions upon the alienation of allotted lands while in the hands of full-bloods, whether received directly by allotment or indirectly by inheritance, is too clear to admit of a doubt. *The constitutionality of the act, so far at least as the Creek Indians are concerned, is equally clear, since the so-called Citizenship Act of March 3, 1901, was never intended to confer any sort of citizenship upon them.*

Second, as to Nos. 330 and 331.

I.

The petitions should be dismissed, since this court has no jurisdiction, for the following reasons:

No case is here presented which involves the exercise of judicial power by the Supreme Court within the meaning of the Constitution.

The procedure and relief must be limited to those provided in the special act under which these suits were brought and this act authorizes merely an opinion of the court as to the validity of certain legislation of Congress, without the rendition of any enforceable judgment.

As to the *Brown and Gritts* case, No. 331, the questions are moot for the additional reason that since the commencement of the suit Congress, by act of May 27, 1908, has passed another statute renewing and extending substantially the same restrictions upon alienation, and this later act will still be in force whatever may be the finding of the court as to the validity of other legislation.

II.

Upon the merits the decree of the Court of Claims should be affirmed.

The provisions of law, which the appellants in these cases ask to have declared void are not to be distinguished on constitutional grounds from the very provisions under which they claim title.

The provisions complained of are constitutional, since Congress never intended to emancipate the Indians concerned from its peculiar control over them as Indians.

At any rate, so far as No. 331 is concerned, Congress had the power to pass the provisions complained of to protect the helpless and incompetent full-bloods as a class, whether full-fledged citizens of the United States or not. And so far as No. 330 is concerned, the power of Congress over the unallotted lands and funds of the Cherokee tribe was in 1906 as supreme as it ever was.

Respectfully submitted.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney General.

DECEMBER, 1910.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

MARCHIE TIGER, PLAINTIFF IN ERROR,
v.
THE WESTERN INVESTMENT COMPANY AND Ellis H. Hammett, R. C. Allen, and J. C. Pinson, copartners under the name of Coweta Realty Company. } No. 60.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF SUBMITTED ON THE PART OF THE UNITED STATES AS REPRESENTATIVE OF INDIANS INTERESTED IN THE QUESTIONS OF THE CASE.

STATEMENT.

While the United States is not a party to this case, it asks the court's consideration of this brief because the case is of much moment to all Indians of the Five Civilized Tribes, whose interests the United States is bound to guard, and also because the case presents the same question concerning the power of Congress to forbid for a period the alienation of their allotted

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lands by full-bloods as was involved in *Brown and Gritts* v. *The United States*, No. 331 of this term, assigned for argument with this case.

On August 8, 1907, two or three months before Oklahoma became a State, Marchie Tiger, the plaintiff in error, a full-blood Creek Indian, undertook to convey to the Western Investment Company 320 acres of land, inherited from full-blood relatives of the Creek Nation, which had been allotted to them as members of that tribe (R., 18, 31, 32). On various dates from the 1st of July, 1907, to the 13th day of August of the same year, Marchie Tiger also undertook to convey to the Coweta Realty Company 320 acres of allotted land which he had inherited from other full-blood relatives of the same tribe (R., 19, 31, 32).

The dates of these conveyances are interesting, if not material, for even according to the defendants' contention, the restrictions imposed by Congress upon the conveyances of land inherited from full-blood allottees of the Creek Nation did not expire until July 26, or August 8, 1907. Certainly if the restrictions upon alienation expired on either of these dates, which in fact they did not, as will be shown later, these companies can not be accused of sloth in parting the full-blood Indian from his patrimony, for within less than a week after the restrictions upon alienation were supposed to expire this full-blood Creek Indian had been led to dispose of, apparently, all his inherited land.

Prior to suit Marchie Tiger tendered to the Western Investment Company $2,000, the entire sum which had been paid him for the land which he had undertaken to convey to it, and to the Coweta Realty Company $558, which had been paid to him in part payment by the latter company (R., 19). In each case the tender was refused (R., 19).

As stated by the Supreme Court of Oklahoma, the sole question for consideration is "whether a full-blood Creek Indian could, on (and after) the 8th day of August, 1907, convey lands inherited by him from his relatives who were full-blood Creek Indians, which lands had been allotted to his relatives as the portion of lands to which they were entitled as members of the Creek tribe of Indians." The court below decided that he could. The question itself depends upon the construction of sections 19 and 22 of the act of April 26, 1906, ch. 1876, 34 Stat., 137, 144, 145, quoted in full below. The jurisdiction of this court is therefore clear.

LEGISLATION INVOLVED.

Sections 19, 20, 22, and 23 of the act of April 26, 1906, deal with the full-blood Indians of the Five Civilized Tribes as a unit and as an incompetent class. The contention of the Government is that these sections are complete in themselves, and were designed by Congress to provide a uniform and exclusive system for the alienation of lands by full-blood Indians of the Five Civilized Tribes. The

sections, because of their importance, are quoted out of their historical order, and are as follows:

> Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of

patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee. (Act of April 26, 1906, ch. 1876, 34 Stat., 144.)

Sec. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval of the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory. (34 Stat., 145.)

Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her

share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. (34 Stat., 145.)

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or by a United States commissioner. (34 Stat., 145.)

In this connection section 9 of the act of May 27, 1908, ch. 199, 35 Stat., 312, 315, deserves attention, for it continues to deal with the full-bloods of the Five Civilized Tribes as a unit, and also serves as a

Congressional interpretation of the sections quoted above. That section is in full as follows:

> Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

The legislation prior to April 26, 1906, dealing with the allotment of lands among the members of the Five Civilized Tribes, will be given in its historical order where the subject-matter permits.

Section 15 of the act of March 3, 1893, ch. 209, 27 Stat., 612, 645, provides in full as follows:

> Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

It is well known that the Five Civilized Tribes failed to take advantage of this section to any considerable extent.

Section 16 of the act of March 3, 1893, ch. 209, 27 Stat., 645, provides in part as follows:

> Sec. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter

> into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

The commission authorized by section 16, afterwards known as the Dawes Commission, ultimately succeeded in making agreements with all of the Five Civilized Tribes, providing for the allotment of their lands in severalty.

The act of July 1, 1898, ratified the agreement which the Dawes Commission had made with the *Seminole* Nation, Act of July 1, 1898, ch. 542, 30 Stat., 567, 568, which provides in part as follows:

> All lands belonging to the Seminole tribe of Indians shall be divided into three classes,

designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided for the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk

of the United States court at Wewoka. (30 Stat., 567.)

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity. (30 Stat., 568.)

The act of March 1, 1901, ratified, modified, and confirmed the agreement of the Dawes Commission with the *Muskogee (or Creek) tribe of Indians.* (Act of March 1, 1901, ch. 676, 31 Stat., 861, 862, 863.)

Section 3 of this act provided for the allotment of lands in allotments of one hundred and sixty acres, except where the appraised value of the land was worth less than $6.50 per acre, in which case the al-

lottee was to be allowed to select additional land to make up the deficiency.

Section 7 of the act of March 1, 1901, 31 Stat., 863, 864, was in full as follows:

> 7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.
>
> Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.
>
> The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein im-

> posed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

The act of June 30, 1902, ch. 1323, 32 Stat., 500, 501, 503, modified the agreement with the *Creek* Nation by amending the act of March 1, 1901, ch. 676, 31 Stat., 861.

Section 16 of the Act of June 30, 1902, corresponds to section 7 of the act of March 1, 1901, and forbids the alienation of allotted land by the allottee or his heirs for five years from the date of the approval of the supplementary agreement, by which name the act in question is known.

Section 22 of the act provided that the supplementary agreement should take effect upon the President's issuing a proclamation making public announcement of the ratification of the agreement by the Creek Nation.

On the 26th day of July, 1902, the President made the required proclamation, the proclamation being dated August 8, 1902 (Proclamation No. 34, 32 Stat., 2021). Consequently, the pertinent restrictions upon alienation imposed by section 16, unless extended or superseded by subsequent legislation (as in fact they were), expired on July 26, 1907, or August 8, 1907.

Section 16 of the act of June 30, 1902, 32 Stat., 500, 503, is in full as follows:

> 16. Lands allotted to citizens shall not in any manner whatever or at any time be en-

cumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be

> absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. (32 Stat., 500, 503.)

The act of July 1, 1902, ch. 1375, 32 Stat., 716, 717, provided for the allotment of lands among the members of the *Cherokee* Nation, with certain restrictions upon alienation.

Sections 14 and 15 of this act are in full as follows:

> Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold, to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.
>
> Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent. (32 Stat., 717.)

The act of July 1, 1902, ratified the agreement which the Dawes Commission had made with the *Choctaw and Chickasaw* tribes of Indians providing for the allotment of lands among the members of said tribes, with certain restrictions upon alienation (Act of July 1, 1902, ch. 1362, 32 Stat., 641, 642).

Section 11 of this act provided for allotments consisting of three hundred and twenty acres each, except in the case of freedmen, who were only to receive forty acres.

Section 12 of the act provided that a homestead should consist of one hundred and sixty acres and

should be "inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment."

Sections 13, 14, 15, and 16 of said act are in full as follows:

> 13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.
>
> 14. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.
>
> 15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.
>
> 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as

follows: One-fourth in acreage in one year; one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value. (Act of July 1, 1902, ch. 1362, 32 Stat., 641, 643.)

The act of April 21, 1904, ch. 1402, 33 Stat., 189, 204, 205, contains an important provision distinguishing as to restrictions between members of the Five Civilized Tribes of Indians who are of Indian blood and members who are not of Indian blood. The pertinent provision is in full as follows:

* * * And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and *except as to homesteads*, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing

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> and shall be recorded in the same manner as patents for lands are recorded. (33 Stat., 204, 205.)

The act of April 21, 1904, was followed by the act of April 26, 1906, ch. 1876, 34 Stat., 137, 144, 145, whose provisions, in so far as they relate to alienation of land by full-blood Indians of the Five Civilized Tribes, have all been referred to and quoted.

Section 15 of the act of March 3, 1893, ch. 209, 27 Stat., 612, 645, provided in full as follows:

> Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

However, in the case at bar, the allotments were made under the act of June 30, 1902, ch. 1323, 32 Stat., 500, 503.

Section 19 of the act of June 30, 1902, contains provisions which indicate that the Indian allottees were to be entitled to special protection at least so long as the tribal government should be continued in existence. Said section is in full as follows:

> 19. Section 8 of the agreement ratified by said act of March 1, 1901, is amended and as so amended is reenacted to read as follows:
>
> The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land, and during the continuance of the tribal government the Secretary of the Interior, through such Indian agent, shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law. (32 Stat., 504.)

Sections 6 and 8 of the General Allotment Act of February 8, 1887, Ch. 119, 24 Stat., 388, 390, 391, provide as follows:

> Sec. 6. That upon the completion of said allotments and the patenting of the land to said allottees, each and every member of the respective bands or tribes of Indians to whom

allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * * * *

Sec. 8 (in part). That the provision of this act shall not extend to the territory occupied by Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, * * *.

The act of March 3, 1901, 31 Stat., 1447, provided that section 6 should be amended by inserting after the words "civilized life," "and every Indian in

Indian Territory." Section 6 of the act of February 8, 1887, 24 Stat., 390, was again amended by the act of May 8, 1906, 34 Stat., 182, and therein declared inapplicable to "any Indians in the Indian Territory."

However, since March 3, 1901, Congress has continued to enter into agreements with the Five Civilized Tribes as tribes, and has continued their tribal existence and government. Joint Resolution March 2, 1906, 34 Stat., 822; Act of April 26, 1906, ch. 1876, 34 Stat., 137, 148. Section 28 of the latter act is in full as follows:

> Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

In the act enabling Oklahoma to become a State, Congress provided for the continuance of its peculiar power over the Indians by the following provisions:

> That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed. (Act of June 16, 1906, ch. 3335 34 Stat., 267, 268.)
>
> And said convention shall provide in said constitution— * * *
>
> Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian Reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. (Act of June 16, 1906, Ch. 3335, 34 Stat., 269.)

* * * * *

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. (Act of June 16, 1906, ch. 3335, 34 Stat., 270.)

Doubtless proper assignment of errors will be made in the brief of plaintiff in error. The United States, not being a party, cannot assign error; but we ask the court to consider and decide the question to which this brief relates, even if any technical insufficiency be found in the assignment of errors. The wide importance of the question calls for its consideration.

ARGUMENT.

I.

The power of Congress to extend the restrictions previously imposed upon the alienation of allotted land by members of the Five Civilized Tribes and their heirs is, at least in the case of the full-blood allottee and full-blood heir, so clear that the scope of the provisions extending such restrictions should not be narrowed by interpretation in an effort to avoid frivolous objections on constitutional grounds.

Congress itself has shown by unmistakable evidence its belief in its power to extend the restrictions imposed upon the alienation of land by the full-

blood Indians of the Five Civilized Tribes, for it is indisputable that in the case of the full-blood Indian allottee it extended, and intended to extend, the restrictions upon alienation (Sec. 19, Act of April 26, 1906, ch. 1876, 34 Stat., 144, 145). It must be conceded that no distinction on constitutional grounds can be drawn between the full-blood Indian allottee and the full-blood Indian heir as to the power of Congress to extend restrictions.

The unquestionable extension in the case of the full-blood Indian allottee is entitled to great respect not only as indicating the view of Congress as to its power, but its view as to the status of the full-blood Indians, their incompetence, and continued need for protection.

It will be shown under the propositions A and B, stated below, that Congress had full power at all times prior to the admission of Oklahoma as a State, if not subsequent thereto, to extend the restrictions imposed upon full-blood Indian allottees and full-blood Indian heirs in the alienation of allotted land.

A.

The status of the Indian allottees of the Five Civilized Tribes as a separate and peculiar race has been maintained throughout the entire legislation preceding the admission of Oklahoma as a State, or, at any rate, if ever abandoned, it was subsequently revived with the assent of the Indians. Therefore, taking the legislation as a whole, it can not be said that Congress has revealed an inten-

tion to give up its power to legislate for them as Indians.

B.

Whether the full-blood Indians were United States citizens or not, Congress nevertheless had full power to extend the restrictions imposed upon them in view of their incompetence as a class.

A.

The status of the Indian allottees of the Five Civilized Tribes as a separate and peculiar race has been maintained throughout the entire legislation preceding the admission of Oklahoma as a State, or, at any rate, if ever abandoned, it was subsequently revived with the assent of the Indians. Therefore, taking the legislation as a whole, it can not be said that Congress has revealed an intention to give up its power to legislate for them as Indians.

The question of whether citizenship was ever conferred upon these Indians is comparatively unimportant and may be disposed of briefly. The question of whether the acts purporting to confer citizenship upon the Indians destroyed their peculiar relation to the United States is more important, but both of these questions become immaterial if the peculiar relation of the Indians to the United States was subsequently renewed with their assent expressed or implied.

The fact that the allotments in the case at bar were not made under section 15 of the act of March 3, 1893, ch. 209, 27 Stat., 645, but under the act of

June 30, 1902, ch. 1323, 32 Stat., 500, 503, is a sufficient answer to any claim to citizenship under section 15 of that act, for clearly section 15 conferred citizenship only upon those receiving allotments under it.

However, the appellees rely chiefly, if not entirely, upon section 6 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 390, 391, as amended by the act of March 3, 1901, c. 8681, 31 Stat. 1447, to support their contention that the members of the Five Civilized Tribes became citizens of the United States in all respects whatsoever prior to April 26, 1906, and have since continued to be United States citizens in all respects whatsoever. Section 6 and section 8 of the General Allotment Act provide as follows:

> Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any

> tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.
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> Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, * * * .

The act of March 3, 1901, provided that section 6 should be amended by inserting after the words "civilized life" the words, "and every Indian in Indian Territory," act of March 3, 1901, Ch. 868, 31 Stat., 1447. However, it did not expressly repeal section 8.

The position of the phrase "and every Indian in Indian Territory," in section 6, as amended by the act of March 3, 1901, suggests that the class to which it refers may reasonably be limited by the provision which immediately precedes it and which refers to Indians in the United States who have voluntarily taken up their residence separate and apart from any tribe of Indians and have adopted the habits of civilized life. Doubtless there was such a class of Indians in the Indian Territory, especially

in its rapidly growing towns, who had taken up their residence separate and apart from their tribes and had adopted the habits of civilized life and were, in fact, more or less ready for citizenship.

The act of March 3, 1901, if limited to such a class, would be in more harmony with section 8 of the General Allotment Act, which it did not expressly repeal and which, therefore, should be given some effect unless entirely inconsistent with section 6 as amended by the act of March 3, 1901. Moreover, if the act of March 3, 1901, is thus limited in its scope, it would be in more harmony with the fact that Congress, in the act of May 8, 1906, 34 Stat., 182, amended section 6 of the General Allotment Act, and in that amendment not only completely ignored the act of March 3, 1901, but expressly declared that the section should be inapplicable to any Indians in the Indian Territory.

But whether the act of March 3, 1901, conferred citizenship upon all members of the Five Civilized Tribes or not, it did not completely destroy the peculiar relation of these Indians to the United States; or at any rate, even if it did, that relationship was subsequently renewed and acquiesced in by the Indians themselves. Certainly Congress may, if it chooses, confer a qualified citizenship upon Indians dwelling within a territory.

General words conferring citizenship should, therefore, be construed in connection with other Congressional legislation of about the same date showing an intention on the part of Congress to retain in some

degree its peculiar control over the Indians in question.

Congress, at the same session at which it passed the so-called citizenship of March 3, 1901, also passed an act recognizing and continuing in many respects, the peculiar relation of the Creek Indians to the United States. Thus section 46 of the act of March 1, 1901, ch. 676, 31 Stat., 872, continued the tribal government of the Creek nation until March 2, 1906, subject to such further legislation as Congress might deem proper. Section 43 of the act promised them special protection against the sale of intoxicating liquors. Section 44 provided that the existing treaties between the United States and the Creek tribe of Indians should continue in effect except so far as inconsistent with the act. Section 1 of the same act provided for the approval of the act by the Creek National Council. On May 25, 1901, the Creek National Council approved the act of March 1, 1901. *The act of March 1, 1901, from the very nature of the provisions above referred to, indicates a peculiar relation between the United States and these Indians. It is inconceivable that such an act would be passed with reference to ordinary citizens. In the first place, a tribe of citizens would be a novelty.* The existence and continuance of treaties between the United States and a body of citizens would be out of the ordinary to say the least. That an act of Congress should provide for its ratification through a body known as a national council is scarcely consistent with ordinary citizenship. Whatever citi-

zenship may have been conferred upon these Indians by the act of March 3, 1901, it must be taken as qualified by existing conditions and modified by subsequent agreements entered into between the United States and the Indians.

The supplementary agreement of June 30, 1902, 32 Stat., 500, 504, also provided for its ratification by the council of the Creek Nation and continued in full force and effect most of the provisions of the act of March 1, 1901, ch. 676, 31 Stat., 861, 872. On the 26th day of July, 1902, the Creek Council ratified said supplementary agreement of June 30, 1902. (Proc. No. 34, 32 Stat., 2021.) Section 19 of the supplementary agreement directs the Secretary of the Interior during the continuance of the tribal government to protect the allottee in the possession of his land against all persons claiming under any lease, agreement, or conveyance not in conformity with law. That the Indian allottees were to continue thus to be under the special protection of the Secretary of the Interior so long as the tribal government continued is significant. It suggests that the peculiar relationship of these Indians to the United States should continue at least so long as the tribal government was continued. Their tribal government was subsequently continued indefinitely. (Joint Resolution, March 2, 1906, 34 Stat., 822; Sec. 28 of the act of April 26, 1906, ch. 1876, 34 Stat., 137, 148.) May it not reasonably be assumed that Congress has continued the tribal existence and government of these Indians as a sign that it intended to reserve to itself the right

to legislate for them as Indians? So long as this was one of the reasons which influenced Congress in continuing their tribal existence it matters not what other reasons may have influenced Congress to do so. The tribe being one of the most characteristic features of the Indians, its continuance by the political government indicates that Congress has continued their political status as Indians.

Subsequent to March 3, 1901, Congress also entered into agreements with other tribes of the Five Civilized Tribes, which agreements in most respects are similar to those entered into with the Creek Nation. (See act of July 1, 1902, ch. 1375, 32 Stat., 716; act of July 1, 1902, ch. 1362, 32 Stat., 641.)

Not only did Congress subsequent to March 3, 1901, continue to enter into agreements with these Indians as a tribe, but the individual Indians of the Creek Nation, aside from being bound by the action of their tribe, as they undoubtedly are, have, by their own acts, acquiesced in the continuance of the tribal government, and consequently the peculiar relation to the United States, which such a government implies, by accepting allotments under the supplementary agreement of June 30, 1902, ch. 1876, 32 Stat., 500, 503, which had previously been ratified by the council of the Creek Nation on July 26, 1902 (Proc. No. 34, dated August 8, 1902, 32 Stat., 2021).

The conclusion seems almost inevitable either that the peculiar status of the Creek Indians was not destroyed by the so-called citizenship act of March 3, 1901, or that it was renewed with the assent of

all parties concerned. In other words, the power of Congress to legislate for the Creek race as Indians was either never lost, or was renewed before Oklahoma became a State and before the act of April 26, 1906, was passed.

The Enabling Act of June 16, 1906, ch. 3335, 34 Stat., 267, 268, 269, 270, confirms this view, for, even in that act Congress attempted to retain the right to legislate concerning these Indians specially and in the manner that it has always been accustomed to legislate concerning Indians, to wit, by treaties, agreements, and statutes.

The conclusion which has just been reached is strengthened by the most recent decisions of this court, which undoubtedly proceed upon the theory that it is to be presumed that Congress intends to continue its personal jurisdiction and guardianship of this incompetent race, except where a contrary intention clearly appears. This is a natural presumption based upon the relation which the Indians in question have always borne to the United States. Even the *Heff* case, upon which the appellees chiefly rely (197 U. S., 488, 499), and which is to be distinguished from the case at bar in many particulars hereafter noted, recognizes this presumption.

In *United States* v. *Celestine*, 215 U. S., 278, 289, 291, 292, this court distinguished between *the Indians* who received allotments under the General Allotment Act of February 8, 1887, and who were, by the first sentence of section 6 of said act, expressly declared

"to be subject to the laws, both civil and criminal, of the State or Territory in which they may reside," and for whom it was expressly provided that "no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," *and the Indians*, who were merely declared by the second sentence of the same section of said act to be citizens of the United States and entitled to all the rights, privileges and immunities of such citizens and who received their allotments under other acts or treaties. A glance at section 6 of the General Allotment Act as amended by the so-called Citizenship Act of March 3, 1901, shows that the members of the Five Civilized Tribes became United States citizens, if at all, under the second sentence of that section.

The significance of this fact appears in the following language of the opinion by Mr. Justice Brewer, which is in part as follows:

> It will be seen that the first sentence of the latter section [to-wit, section 6 of the General Allotment Act], which provides that the allottees shall be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and

> immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizenship.
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> Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States (pp. 290, 291).

In *United States* v. *Sutton*, 215 U. S. 291, 292, the defendants were indicted in the District Court of the United States for the Eastern District of Washington for introducing liquor into the Indian country, to-wit, upon a certain Indian allotment within the limits of the boundary of the Yakima

Indian Reservation in the Eastern District of Washington, in violation of the act of January 30, 1897, ch. 109, 29 Stat., 506, by which it was provided "that * * * any person who shall introduce * * * intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished," etc.

The defendants demurred to the indictment upon the ground that the act was invalid, at least in so far as it related to the land in question, which, together with other land in the reservation, had been allotted subject to restrictions against alienation to Indians, who, by virtue of said allotment, became citizens of the United States under section 6 of the General Allotment Act. The lower court sustained the demurrer, squarely basing its judgment upon the invalidity of the act. This court reversed the judgment of the lower court and fully sustained the validity of the act.

Although in the *Sutton* case the particular land in question had been allotted subject to defeasance, and was held in trust by the United States, several considerations make it clear that neither of these facts was deemed in any way essential to the judgment of this court. The fact that the title was held in trust by the United States is not mentioned by Mr. Justice Brewer in his opinion. Moreover, under the provisions of the act itself, the fact that the land was

subject to defeasance is wholly immaterial, and the fact that the title was held in trust by the United States was merely cumulative, as the act does not distinguish between Indian land held in trust by the United States and land inalienable by the allottee without the consent of the United States. Had the court intended to base its judgment sustaining the validity of the act upon the peculiar circumstances of the case it would have doubtless made this clear. But, however this may be, the court itself expressly approved *Couture* vs. *The United States*, 207 U. S. 581, a case in which it had but recently sustained the validity of this very act, and that too where the land in controversy was not held in trust by the United States, but was merely inalienable without its consent. The judgment in the *Sutton* case is significant on whatever grounds it may bave been based as recognizing the right of Congress to retain and exercise police power over the land occupied by Indian allottees, despite the fact that the land is situated within a State, and the Indians are citizens of the United States. However, the opinion by Mr. Justice Brewer indicates that the judgment was based in part at least upon the broad proposition that Indian allottees, though citizens of the United States, are nevertheless wards of the United States so long as they hold their land subject to restrictions against alienation. At any rate, the lower court based its judgment holding the act of January 30, 1897, invalid, chiefly upon the authority of the *Heff* case, 197 U. S. 488, which it understood as having

practically decided that Congress, by conferring citizenship upon Indian allottees, necessarily abandons its relation as their guardian. That this court did not place any such interpretation upon the *Heff* case would seem to be clear from the opinion by Mr. Justice Brewer in the *Sutton* case (who also wrote the opinion in the *Heff* case). Mr. Justice Brewer's opinion is in part as follows:

> The limits of the Yakima Reservation were not changed by virtue of the allotments that are referred to in the stipulation of facts. The lands allotted were subject to restrictions against alienation, and the title which was conferred by the allotments was subject to defeasance. * * * In this offense neither race or color are significant. Indians, as wards of the Government, are beneficiaries, but for their protection the prohibition is against the white man and Indian alike. Legislation of this nature has been for a long time in force. Fourth sec., chap. 174, Laws 1832, 4 Stat. 564; Sec. 2139, Rev. Stat. If the Yakima Reservation were within the limits of a Territory there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished (215 U. S. 294, 295).

In the passage quoted above, where Mr. Justice Brewer refers to the Indians as wards of the Government, it can scarcely be supposed that he did not

intend to include within that term "Indian allottees," who had become United States citizens, in view of the fact that the allottee who had possession of the allotment in question had undoubtedly become a citizen of the United States under section 6 of the General Allotment Act, and in view of the fact that the lower court had found against the Government chiefly upon the theory that Indian allottees, being citizens of the United States, were not wards of the Government. In the preceding case of *United States* v. *Celestine* Mr. Justice Brewer had referred to Indian allottees, despite their citizenship, as members of a dependent race. In *United States* v. *Rickert*, 188 U. S. 432, 437, this court, as will hereafter be noted in more detail, had recognized Indian allottees, despite their citizenship, as still wards of the United States. Under the decisions of this court, therefore, it would seem clear that the mere grant of citizenship does not necessarily terminate the peculiar relation of the Indians to the United States, and that the extent to which that relationship continues is to be determined in the light of the entire legislation affecting the tribes in question.

The *Heff* case, 197 U. S. 488, 502, does not conflict with this view and is to be distinguished from the case at bar in that it involved the power of Congress to regulate the sale of liquor to Kickapoo Indians, who were at the time dwelling within a State and who had received allotments under the provisions of the General Allotment Act, expressly and affirmatively subjecting said allottees to the laws, both civil and

criminal, of the State or Territory in which they may reside, and further providing that no Territory shall pass any law denying any such Indian within its jurisdiction the equal protection of the law. Not only did the *Heff* case involve a possible conflict between the police power of the State and the police power of the nation, which is not involved in the case at bar, but the General Allotment Act itself, in so far as it affected the Kickapoo Indians, had to be construed in the light of an earlier treaty which had been entered into between the Kickapoo Indians and the United States and which contemplated that Kickapoo allottees should cease to be members of the tribe upon allotment. Mr. Justice Brewer lays stress upon this fact in his opinion, which is in part as follows:

> Now the act of 1887 was passed twenty-five years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe and become citizens of the United States. The act of 1887, in like manner, provides that at the instance of the President, a reservation may be surveyed and individual tracts allotted to the Indians, and that upon approval of the allotments by the Secretary of the Interior patents shall issue, subject to a condition against alienation and incumbrances during a period of twenty-five years, or longer, if the President deems it

> wise. Section 6 then declares that the "Indians to whom allotments shall have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law" (197 U. S. 502).

In *United States* v. *Rickert*, 188 U. S. 432, 437, this court, in an opinion by Mr. Justice Harlan, had but recently recognized that a mere grant of United States citizenship to Indians does not necessarily prevent their being wards of the United States, or at any rate that the citizenship conferred by section 6 of the General Allotment Act is, or may be, of such a qualified character as to permit Indians receiving citizenship by virtue of said act, to continue to be wards of the United States, in a condition of pupilage or dependency; for in that case, despite the fact that the Indians in question had become citizens of the United States under the first or second sentence of section 6 of the General Allotment Act, this court in its opinion by Mr. Justice Harlan, describes their relation to the United States in these words:

> These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889,

> ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384 (pp. 437, 438).

The *Heff* case, especially when interpreted in the light of the *Rickert, Celestine* and *Sutton* cases, clearly never decided that general words conferring United States citizenship upon Indians destroys *ipso facto* their peculiar relation to the United States, still less that words of this character are to be construed without regard to existing and pending agreements between the United States and the Indians in question.

B.

Whether the full-blood Indians of the Five Civilized Tribes were citizens or not on April 26, 1906, Congress nevertheless had full power to extend the restrictions previously imposed upon them in view of their incompetence as a class.

At the outset it should be observed that there is no question of conflict between state and national authority. Oklahoma did not become a State until after the conveyances at issue in the case at bar had been made, and until long after the act of April 26, 1906, had been passed. The full-blood Indians, as well as the other members of the Five Civilized Tribes, whether full-fledged citizens or not, were subject to the jurisdiction of Congress, as inhabitants of a territory of the United States governed by Congress.

The power of Congress over citizens of the United States dwelling within a territory is at least as great as that of a State over its citizens. This proposition is not only well settled, but is an extremely conservative statement of the power of Congress over United States citizens dwelling within a territory of the United States. The Government by no means concedes that the power of the United States over its citizens within a territory is as limited as that of a State over its citizens, especially in legislation involving classification. However, as it is fully established (as will be shown later), that wherever personal liberty and liberty of contract are being exercised, or are likely to be exercised, by a large body of citizens to the

detriment of themselves, and consequently to the detriment of the State, and this body of citizens is capable of being designated with reasonable exactness by age or sex, or any other circumstance, it is within the power of the State legislature to designate the class by any of the methods named above, and to impose new restrictions upon their liberty of contract and person, or extend existing restrictions, it is unnecessary to show that the power of Congress exceeds that of a State legislature. Only a few decisions need be cited to show that it is at least equal to the power of a State legislature.

In *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43, 44, Mr. Justice Bradley stated the plenary power of Congress over the territories as follows:

> The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired.
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> Chief Justice Waite, in the case of *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, said: "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is

> an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.
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> Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

In *Shively* v. *Bowlby*, 152 U. S. 1, 48, Mr. Justice Gray also briefly states what has been settled by the repeated decisions of this court to be the power of Congress over the Territories as follows:

> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 542; *Benner* v. *Porter*, 9 How. 235, 242; *Cross* v. *Harrison*, 16 How.

164, 193; *National Bank* v. *Yankton County*, 101 U. S. 129, 133; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *McAllister* v. *United States*, 141 U. S. 174, 181.

Since it is clearly established that the power of Congress is at least equal to that of the State legislature, but two questions remain to be considered; whether a State has the power to legislate for its incompetents as a class, and if so, whether the defendants have sustained the burden of showing that the full-blood members of the Five Civilized Tribes were so clearly competent as a class to render the classification unconstitutional, despite the broad discretionary power which exists in every legislative body in determining the basis for classification. The record does not contain a particle of evidence tending to show the full-blood Indians in question competent. Many facts of which this court may take judicial notice point to their incompetence as a class, as will be shown later.

Where a body of citizens are incompetent as a class, may the State, if it sees fit, legislate for them as a class, despite the fact that the class contains many competent members, or must it attempt the impracticable, if not the impossible, feat of having the competency of each member determined judicially?

Wherever the great majority of persons under a given age, or of a given sex, need special protection or consideration, the class is apt to be too large to permit of a judicial determination of the competency or

capacity of each member. In such cases the legislature has always assumed and exercised the power of legislating for them as a class in respect to their incompetency or incapacity. A class determined by age, sex, or any other circumstance common to a large group of persons, will almost invariably contain many competent and capable individuals, in no wise in need of special protection. But the mere existence of competent or capable individuals within such a class does not render the classification unconstitutional. *Muller* v. *Oregon*, 208 U. S., 412, 422.

Women and children are, of course, citizens of the United States (*Minor* v. *Happersett*, 21 Wall. 162, 165, 167). Nevertheless, from the earliest times they have been subject to special legislation. Especially is this true of children, whom it can not be denied the full-blood Indian resembles in his immaturity of thought and in his lack of experience and foresight. Moreover, it is a mistake to suppose that modern legislation has merely continued as to this class of citizens restrictions that already existed. An examination of the status of children at common law, and their status under the statutes of the various states, shows that the common law restrictions have not only frequently been extended, but new restrictions have not infrequently been added.

At common law a male at fourteen, and a female at twelve could (a) legally consent to marriage, 1 Blackstone Com. 436, 437; *Fisher* v. *Bernard*, 65 Vt. 663; (b) could devise personal property, 4 Kent Com. 506; *Davis* v. *Baugh*, 1 Sneed (Tenn.) 477; (c)

a female could consent to carnal knowledge at ten, or, at any rate, at twelve, 4 Blackstone Com. 212; (d) a child could bind himself as an apprentice by contract, Simpson on Infants, pp. 80, 81, and (e), children were not specially prohibited from engaging in trades, occupations and amusements.

As is well known, in many, if not most of the states, the age of consent to carnal knowledge and legal consent to marriage has been greatly raised by statute. In New York the age of consent is fixed by statute at eighteen in both cases. Birdseye, Cummins & Gilbert's Consolidated Laws of New York, vol. 1, page 1021; see also *Conte* v. *Conte*, 82 Appellate Div. (N. Y.), 335. In some states neither males nor females under twenty-one are permitted to dispose of their personal property by will. 16 Am. & Eng. Ency. of Law and Procedure (2d ed.), 265. Under the New York statute females under sixteen and males under eighteen are not at liberty to dispose of their personal property by will. Laws of New York, 1909, chap. 18, sec 15. In many states also children under a certain age, usually either fourteen or sixteen, but in certain cases eighteen or more, are excluded by statute from numerous trades, occupations, and amusements. For example, see New York Criminal Code Amendments 1909, sections 484 to 486; Laws of New York 1892, chap. 673, sections 1 to 3 inclusive.

It is too late to challenge the constitutionality of the power which the states have long exercised over children as a class, despite their citizenship, and de-

spite there being in their number many individuals in no need of special protection, of extending existing restrictions, and adding new ones in respect to their property, their liberty of person and their liberty of contract.

The general power of the legislature of a State over the estates of minors is fully recognized in *Lobrano* v. *Nelligan*, 9 Wall. 295, 296 and in *Hoyt* v. *Sprague*, 103 U. S. 613. In recent years states have undertaken to more effectively control neglected minors, and their efforts in this direction have rarely if ever been declared unconstitutional. See *Whalen* v. *Olmstead*, 15 L. R. A. 515, and the note subjoined upon the State guardianship of minors.

In recent years also many states have passed statutes imposing restrictions in some form upon the number of hours that women may be employed in certain occupations. In the *Muller* case, 208 U. S. 412, 416, 417, 418, this court had under consideration the constitutionality of section 1 of the Oregon Act of February 9, 1903 (Oregon Sessions Laws 1903, page 108). This section was held constitutional, although it clearly restricted the liberty of contract of females by providing that no female should be employed in any mechanical establishment, or factory, or laundry, for more than ten hours during one day.

The Indians whom the Act of April 26, 1906, classifies as incompetents and legislates for as such, are full-blood Indians and therefore presumably the most incompetent of this incompetent race. For more than a century they have been the subject of

special legislation, and whether citizens or not, have had but little experience in the individual ownership of property, and on April 26, 1906, were still holding their land subject to restrictions against alienation imposed by Congress.

It may be reasonably presumed that Congress had before it abundant evidence of the incompetency of the full-blood Indians as a class. At any rate, the finding of the Court of Claims in the *Brown and Gritts* case, 44 Court of Claims, 283–294, 295, 304, assigned for hearing with this case, tends to prove that Congress did not err in its view that the full-blood Indians were the least competent members of the Five Civilized Tribes, and still needed special protection in the sale and leasing of their lands. In that case the Court of Claims had under consideration the validity of the sections of the Act of April 26, 1906, extending the restrictions upon alienation by full-blood Indians of the Five Civilized Tribes, in so far as those sections applied to full-blood Cherokees. What the court found to be true of the full-blood Cherokees is doubtless true of the full-blood Indians of the other tribes. At any rate, it must be presumed to be true until the contrary has been proven. The Court of Claims expressly finds as to the full-blood Cherokees, that

> they are uneducated and unable to speak the English language and have never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands. (Finding 14.)

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And further, that

> Prior to the passage of the act of April 26, 1906, supra, many of the full-blood citizens of the Cherokee Nation had been induced by designing persons to execute deeds of their allotted lands, and contracts to sell, and to otherwise encumber their allotments in violation of the provisions of the act of July 1, 1902, supra, at grossly inadequate compensation.

Not only is the power of Congress to enact special laws for the protection of Indians as a class of incompetents, despite their citizenship, fully established by analogy to the power of the State over its incompetents, but its power so to do in the case of Indian allottees whose land is subject to restrictions against alienation is established by the most recent decisions of this court, only one of which need be noted here.

In *United States* v. *Sutton*, 215 U. S. 291, 295, this court held a statute valid, although it prohibited the introduction of intoxicating liquors upon allotted land subject to restrictions against alienation possessed by Indians, whether citizens of the United States or not, without providing against such introduction upon the land of other citizens of the United States.

Mr. Justice Brewer referred to power of Congress over such land when in the limits of a territory in these words:

> If the Yakima Reservation were within the limits of a Territory there would be no ques-

> tion of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished (p. 295).

This court has never passed, adversely, upon the power of Congress to make special regulations for Indians as a class of incompetent citizens dwelling within a territory governed by Congress. The *Heff* case, 197 U. S. 488, has already been discussed and distinguished. The question was not in any way involved in *Jones* v. *Meehan*, 175 U. S. 1, the other case upon which the defendants chiefly rely. In the *Meehan* case this court held Congress could not, after granting land to an Indian free from restrictions and after he had leased the land in question, invalidate that lease. There the rights of third parties were involved. Here in the case at bar no valid contract could have been entered into prior to the date of the Act of April 26, 1906.

II.

The constitutionality of the act of April 26, 1906, ch. 1876, 34 Stat., 137, 144, 145, having been established, the sole remaining question is whether a full-blood Creek Indian could, without violating its provisions, on and after the 8th day of August, 1907, convey lands inherited by him from his relatives who were full-blood Creek Indians, and whose lands, had been allotted to them as members of the Creek tribe of Indians. Under the provisions in force prior to

the passage of the Act of April 26, 1906, Creek Indians, whether full-bloods or not, were to be at liberty to dispose of their allotted or inherited land on and after the 8th day of August, 1907. The validity of the conveyances in the case at bar, therefore, depends upon the construction of the Act of April 26, 1906, and more particularly upon the construction of the first sentence in section 19 of that Act and the last sentence of section 22 of the same Act. These sentences provide as follows:

> Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. (34 Stat., 144.)
>
> Sec. 22. * * * All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. (34 Stat., 145.)

The sentences quoted above are undoubtedly a part of a system—according to the Government's contention, a system complete in itself and com-

posed of sections 19, 20, 22, and 23 of the act of April 26, 1906, all of which deal with the full-blood Indians of the Five Civilized Tribes as a unit and as an incompetent class in especial need of protection. The sections are in full as follows:

> Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents there-

after issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

Sec. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a

deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or a Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner. (Act of April 26, 1906, Chap. 1876, 34 Stat., 144, 145.)

It is clear upon the face of the sections quoted above that if the words "lands allotted to him" include allotted lands inherited by full-blood Indians

from full-blood allottees, the sale of the latter is expressly forbidden for twenty-five years from the passage of the act, except in accordance with the rules and regulations provided for by the last sentence of section 22. It will be recalled that in the case at bar the sales were made without reference to any such rules or regulations.

Even if the words "lands allotted to him" do not include allotted lands inherited by full-blood Indians, it is nevertheless clear that if the sections quoted above are complete in themselves, in so far as they relate to the full-blood Indians of the Five Civilized Tribes, and their lands or the allotted lands inherited by them and were consequently designed to supersede previous restrictions as to such land, the last sentence in section 22 must either be construed as prohibiting the alienation of allotted lands inherited by full-blood Indians, or given no effect at all. For the last sentence in that section clearly prescribes a rule for the alienation of allotted lands inherited by full-blood Indians of the Five Civilized Tribes, either as merely a continuation and modification of previous restrictions (a construction which will be shown to be out of harmony with the general purpose of the sections), or as a special exception to section 19, if the words "lands allotted to him" therein contained include allotted lands inherited by full-blood Indians, or as a substantive provision entirely independent of previous restrictions, and in fact independent of any of the special provisions contained in the sections

quoted above, but nevertheless a coherent part of the system established by said sections.

If the words in section 19, "lands allotted to him" include allotted lands inherited by full-blood Indians, the construction of the last sentence in section 22 is immaterial, for in that case the sale of such land is either absolutely prohibited, or is invalid, unless made in accordance with the rules and regulations prescribed and provided for by section 22 of the act. This is a reasonable interpretation of the words quoted above, and doubtless the interpretation which should be placed upon them, unless some other provision in the act affirmatively provides against the sale of such lands. However, as the Government is convinced that the last sentence in section 22 is to be construed as a substantive provision entirely independent of previous restrictions, and indeed independent of any special provisions of the sections so frequently referred to, but nevertheless a coherent part of the system provided for by them, and is in fact a prohibition against the sale of such lands, except in accordance with the rules and regulations provided for by it, the many considerations that support this construction will first be presented.

Sections 19, 20, 22, and 23 of the act of April 26, 1906, 34 Stat., 144, 145, when taken together disclose an intention on the part of Congress to provide, as to all lands then subject to restrictions against alienation, a uniform and exclusive system in reference to the alienation thereof by the full-blood Indians of the Five Civilized Tribes. In other words,

the sections show an intention on the part of Congress to establish a system complete in itself, and designed to entirely supersede existing regulations as to the alienation of such lands by full-blood Indians of the Five Civilized Tribes.

The sections in question show beyond a reasonable doubt that Congress, at the time of their enactment, fully realized that the incompetency of the members of the Five Civilized Tribes was to be determined, not by the tribe to which they belonged, but by the amount of Indian blood in their veins.

Even if the words in section 19 "lands allotted to him" were used in a technical sense, and refer only to lands while still in the possession of the original allottee, the fact remains that the section deals with the full-blood Indians of the Five Civilized Tribes as a unit, and as an incompetent class, to be subjected to special restrictions without regard to previous restrictions. The fact that the restrictions imposed by this section, if such is the fact, relate only to a part of the lands possessed by the full-blood Indians, can not alter the fact that whatever restrictions are imposed, are imposed without regard to previous restrictions, and that the basis for their imposition is the possession of the Indian blood in the highest degree.

Moreover, section 20, whether it is to be construed as requiring that all leases of any land for more than one year thereafter to be made by full-blood Indians of the Five Civilized Tribes, shall be in writing and approved by the Secretary of the Interior, or is to be

construed as only requiring this in respect to leases of allotted lands while in the possession of the original allottee, at any rate, deals with the full-blood Indians as a unit, as an incompetent class, and without regard to previous restrictions.

Section 23 likewise deals with them as a unit, and as a class in special need of protection, for under its provisions full-blood Indians alone of all the Indians of the Five Civilized Tribes are expressly prohibited from alienating their real estate by will, except under certain circumstances, or in accordance with certain conditions.

It is equally clear that section 22 under any construction whatsoever distinguishes between full-blood Indians and other members of the Five Civilized Tribes and by its express provisions recognizes the incompetence of the former as compared with the latter.

Certainly, there is nothing upon the face of any one of these sections, which, in the remotest degree indicates that the restrictions placed by them upon the alienation of land by full-blood Indians were to have any relation to the heterogenous restrictions previously existing in reference to the different tribes, but they do contain many express provisions utterly inconsistent with previous restrictions.

For example, section 19 of the act of April 26, 1906, provides against the alienation of land by full-blood Indians for twenty-five years from the date of its passage. This provision is inconsistent with previous restrictions, whether it applies to allotted

lands only, when in possession of the original full-blood allottee, or to allotted land when in the possession of any full-blood allottee, for the restriction, whatever its scope, is based upon blood, not upon membership in a particular tribe. Previous restrictions upon alienation, had, as a rule, been different for the different tribes, both in their substantive provisions, and in the dates at which they were to expire. (See as to Seminole restrictions, act of July 1, 1898, 30 Stat., 567, 568; as to Creek restrictions, sections 16 and 17 of the act of June 30, 1902, 32 Stat., 500, 503, 504; as to Cherokee restrictions, sections 14 and 15 of the act of July 1, 1902, 32 Stat., 716, 717; as to Choctaw and Chickasaw restrictions, sections 13 to 16 of the act of July 1, 1902, 32 Stat., 641, 642, 643.)

The particular dates at which the previous restrictions upon alienation were to expire, are not material, but it is important to note, first, that they had a apparently been fixed under the exigencies of the particular occasion, without any special regard to what Congress now evidently conceived to be the best test of incompetence, to wit, the possession of Indian blood in the highest degree; and, second, that they were to occur in most, if not all, cases sooner than Congress deemed to the best interests of the full-blood Indians.

What has been said of section 19 is, of course, equally true of section 20, only its provisions relate to leasing, rather than alienation proper. The

previous restrictions upon leasing had varied with the different tribes. For example, under the previous restrictions, the Seminoles could lease their allotments for six years or less, subject to the approval of their principal chief, and certain other special conditions, not here material (the act of July 1, 1898, 30 Stat., 568), while the Creeks could lease their allotments for a term of one year or less for grazing purposes, or for five years or less for agricultural purposes, without the approval of the Secretary of the Interior, and with his approval for a longer period. (Section 17 of the act of June 30, 1902, ch. 1323, 32 Stat. 504.) As to full-bloods, section 20 obviously changes all this, for its restrictions upon leasing, however broad or narrow, apply uniformly to all full-blood Indians of the Five Civilized Tribes, under similar circumstances and conditions.

Section 23 obviously supersedes previous restrictions upon alienation by will, whatever these restrictions may have been, and as to the devising of real estate, by full-blood Indians of the Five Civilized Tribes, establishes a uniform rule different from that applicable to Indians of less than full-blood.

From what has just been said, it is clear that sections 19, 20, and 23 impose additional restrictions upon the full-blood Indians of the Five Civilized Tribes, and that these restrictions, however broad or limited in their scope, disregard the differences that formerly existed between the different tribes of the Five Civilized Tribes, and are uniformly based

upon the actual or presumed incompetence of the full-blood Indians as a class.

Section 22 whether it supersedes previous regulations or not, at least contains no language in terms declaring that the old distinction between the full-blood Indians of the different tribes should be preserved.

Not only do the sections themselves show that by April 26, 1906, Congress had come to realize that the incompetence of these Indians could be best determined by the amount of Indian blood in their veins, but the supposition that they were enacted by Congress upon that theory is confirmed by other legislation on the subject as well as by the circumstance, already discussed in dealing with the constitutionality of the act, that the full blood Indians are in fact the most incompetent of this incompetent race.

The act of April 21, 1904, ch. 1402, 33 Stat., 189, 204, 205, distinguished between the members of the Five Civilized Tribes who were of Indian blood and those who were not of Indian blood; though the pertinent provisions of this act were concerned chiefly, if not entirely, with the removal of restrictions upon alienation, they are nevertheless important as indicating that Congress was beginning to realize that the existence of Indian blood was the proper basis for classification in respect to restrictions upon alienation. The idea once having occurred to Congress of distinguishing between the members of the Five Civilized Tribes with reference to the

amount of Indian blood in their veins, it was but a natural step from the act of April 21, 1904, recognizing the absence of Indian blood as a basis for removing restrictions to the act of April 26, 1906, recognizing the existence of Indian blood in the highest degree as a basis for imposing restrictions, and from both of these acts to the act of May 27, 1908, Chapter 199, 35 Stat., 312, 315, Section 9 of which carries the principle of determining the incompetence of the Indians by the amount of Indian blood in their veins still further, and under whose provisions the restrictions are greatest in the case of full-blood Indians, less stringent in the case of Indians of less than full-blood but more than one-half Indian blood, and still less stringent in the case of Indians of less than one-half Indian blood.

The sections themselves deal with the full blood Indians and their lands in such detail and at such length as to indicate that they were intended to fully cover the entire subject and consequently to supersede previous restrictions in so far as they related to the alienation, leasing and devising of land by full blood Indians of the Five Civilized Tribes.

Section 19 certainly seems to cover the entire subject of regulating the alienation of allotted land—at least so long as the land remains in the possession of the original allottee. The twenty-five year period against alienation, fixed by the provisions of the section, is the period most often prescribed, being in fact the period adopted by the general allotment act, and was doubtless suggested to Congress by that act

as a period sufficiently long to fully protect the interest of the full blood Indians in question.

Section 20 not only unquestionably supersedes all previous restrictions upon the leasing by full blood Indians of the land therein referred to, but it refers to all the lands possessed by the full blood allottees. No importance is to be attached to the use of the term "full blood allottee" instead of the term "full blood Indian," for at the date of the section's enactment the terms were substantially equivalent for every full blood Indian of the Five Civilized Tribes was doubtless already an allottee, or was to become one.

How it can seriously be claimed that this section refers to the allotted lands only while still in the possession of the original allottee is rather hard to see. Full blood allottees frequently inherit lands and were no doubt at that date in possession of much land so inherited. The section reads—

> "* * * All leases and rental contracts, * * * of full blood allottees * * * shall be in writing and subject to the approval of the Secretary of the Interior," and so forth.

The exception contained in the words omitted from the above quotation by permitting the leasing for certain purposes, for a short period, of "lands other than homesteads" shows beyond question that Congress realized that the words "all leases and rental contracts," in the absence of words limiting their scope, included every lease of any land whatsoever by a full blood Indian. It is noticeable also that

Congress did not use the term "original allottee," with which it was certainly familiar, having but recently used it in the latter part of section 19 where it clearly intended to confer a special favor upon the "original allottee," and further, that even if Congress had used the words "original allottee" the provision as to leasing would have still extended to all leases for more than one year of any land in the possession of said original allottee, but the failure to use the word "original" does suggest that Congress was using the term "full blood allottee" as synonymous with the term "full blood Indian."

As has been previously stated, it cannot be denied that section 23 contains the only special provisions in respect to the devising of property by full blood Indians, and relates to all of the real estate possessed by them.

To construe the last sentence of section 22 as providing the exclusive rule for the alienation of inherited lands by full blood heirs will give unity to the entire system and certainly do no violence to the expressed language of the sentence. The class restricted will then be the full blood Indians of the Five Civilized Tribes taken as a unit. The scope of the restrictions will then be adequate provision to protect them in the alienation, the leasing and devising of their lands.

In fact, if the last sentence of section 22 is thus construed, we have a system as to full blood Indians worthy of the title of the act—"an act to provide for the final disposition of the affairs of the Five

Civilized Tribes in the Indian Territory, * * * a system uniform in its application and based upon the best test for determining the incompetence of the class affected, in fact, based upon a test which we have every reason to believe Congress had already discovered and which we know has since been used by it.

Any construction of these sections which prevents their superseding as to the full blood Indians of the Five Civilized Tribes the previous restrictions which varied in the different tribes, not only destroys the unity of the system, but implies that Congress, despite the fact that it was dealing with the full blood Indians at length, and with a view to finally dispose of their affairs, willfully disregarded the best test of determining their incompetence in respect to a large portion of the land owned by them and continued in force as to such land an illogical distinction between the full blood Indians of the different tribes.

If the previous restrictions as to the alienation of land by the full blood Indians of the Five Civilized Tribes were superseded, as they undoubtedly were, for reasons already set forth, the construction of the last sentence in section 22 offers no difficulty. It is the only provision in any one of the pertinent sections which refers to the alienation of allotted lands inherited by full blood Indians of the Five Civilized Tribes, and establishes the only rule by which they may alienate such land, and as the only provision of

this character its language is incapable of being given any meaning unless construed to prohibit the alienation of such land, except in accordance with the conditions prescribed by it. This is equally true whether it is construed as an independent provision or as an exception to an implied prohibition against the alienation of such land contained in section 19 or as a limitation upon the first sentence in section 22.

This construction of the last sentence in section 22 is strengthened by the absurdity of supposing that Congress intended to permit the full blood Indians of one or two of the Five Civilized Tribes to sell, free from all restrictions, the very land which they were forbidden to lease except upon the approval of the Secretary of the Interior. It has already been shown that section 20 supersedes previous restrictions as to the leasing of allotted lands inherited by full blood Indians and prohibits the leasing of the same except upon the approval of the Secretary of the Interior.

The history of the act of April 26, 1906, does not make against this construction. Even if the defendants were correct in assuming that the last sentence in section 22 in its relation to section 22 and the other sections of that act in the form in which they were introduced in the House of Representatives, or even in the form that they were passed by the House of Representatives, was not intended to extend restrictions, it would by no means follow that because the language of section 22 and the last sentence thereof was not materially changed in the course of the passage of the bill through Congress, their meaning remain unchanged, despite the vital changes made in other sections of the act and the necessary relation of a part to the whole.

No more pernicious rule of construction could be devised than one which provided for the construction of sentences and sections with reference to other sections subsequently modified or discarded by Congress, because unsatisfactory, rather than with reference to the provisions of the act as finally passed by Congress. Such a rule of construction would be unfair to the Executive, who of course judges the act by its final form, and for that matter unfair to the majority, who of course pass it in its final form, and as intelligent representatives of the people must be

taken to fully understand that the meaning of language changes with its connection.

The bill underwent numerous changes in the course of its passage through Congress and was twice in conference. (See H. R. 5976, 59th Congress, First Session, December 11, 1905, a bill by Mr. Curtis; see Report No. 183 on the same, in the House of Representatives, January 11, 1906; see the same bill in the Senate, Calendar No. 269; and Conference Report, House of Representatives, No. 2347.) Neither time nor space will permit of the construction of the pertinent sections of this act in the manifold stages of its development. Besides, it is extremely doubtful if at any stage in its development prior to the form in which it was finally accepted, it was as free from ambiguity as it now is in its final form. For example, section 19, as introduced in the House of Representatives and passed by it, contained the following provision:

> Full blood Indian allottees of said tribes may alienate any of the lands allotted to them, except homesteads, with the consent and approval of the Secretary of the Interior, *and not otherwise*, and all laws or parts of laws inconsistent with the provisions of this section are hereby repealed. (See H. R. 5976, 59th Congress, First Session, and same document dated March 5, 1906.)

It is true that section 19 at a certain stage in its development contained the following provision—

> That all restrictions upon alienations and leasing of lands of Indian allottees of the Choc-

> taw, Chickasaw, Cherokee, Creek and Seminole Tribes of less than full blood are, except as to homesteads, hereby removed; that no full blood Indian of any of said tribes, or his full blood heirs, shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, and so forth. (The first sentence of Section 19 as amended by the Senate, being Amendment No. 46, as numbered in print of bill on March 5, 1906, 59th Congress, First Session in the House of Representatives.)

The words "or his full blood heirs" were stricken out in conference as well as the entire provision removing restrictions as to others than full blood Indians, perhaps, because it was thought by the conference committee that when that provision had been stricken out the clause providing "no full blood Indian * * * shall have the power to alienate * * * lands allotted to him" would naturally be construed as prohibiting the full blood heir from alienating allotted lands inherited by him.

But it is much more probable that the words were stricken out because they were not only entirely unnecessary, in view of the fact that full blood heirs were fully taken care of in the last sentence of section 22, but extremely awkward, to say the least.

The striking out of the words is entirely consistent with the Government's contention that the last sentence in section 22 should be construed as a substan-

tive provision providing that full blood heirs may alienate allotted lands inherited by them under rules and regulations prescribed by the Secretary of the Interior, and not otherwise.

Indeed, if the conference committee took this view of the last sentence, the striking out of the words was necessary to prevent a possible misconstruction of the two sections when taken together, for the express provision in section 19 against the sale, under any circumstances, of allotted land by the full blood allottee or his full blood heir, might be construed to limit the the rule contained in the last sentence of section 22 so as only to permit sale by full blood heirs, even under rules and regulations prescribed by the Secretary of the Interior, when the allotted land in question was inherited from others than full blood allottees. The only thing that is really helpful in the history of the bill is the general attitude of the majority which finally prevailed. The feeling that the Indian should be further protected grew in strength, and the intention to effectively protect at least the full blood is indicated in the refusal of Congress to accept a provision permitting full blood Choctaws and Chickasaws to dispose of their surplus lands in much less than twenty-five years. (This provision will be found at page 1260, Cong. Record, Vol. 40.) No doubt Congress felt that if the full blood Choctaw and Chickasaw was incompetent to dispose of his land in general, the mere fact that he possessed a large amount of land was no ground for giving him a right to dispose of it free from all restrictions.

This suggests that Congress would have been equally anxious to prevent the incompetent full blood from disposing of inherited land free from all restrictions. The general attitude of the majority on the subject of Indian regulation is summed up in these words of Senator Hale. "Our discussion and the expression here, almost without opposition, have been that the Senate conferees upon every one of these provisions should take the ground that the Indian shall not be further despoiled, whether in lease or in outright conveyance, and that every safeguard which can be placed about this bill to prevent that spoliation shall be employed" (40 Cong. Record, 4651).

Although the Government is fully convinced that the last sentence in section 22 was intended as a substantive provision affirmatively prohibiting full blood Indians from disposing of allotted lands inherited by them, except under certain rules and regulations, nevertheless if it is to be construed as not containing an affirmative prohibition against such sale, it should be construed as an exception to an implied prohibition contained in section 19 against the full blood heir's disposing of allotted lands inherited by him.

Several considerations support the view that if section 22 does not effectively protect the full blood heir that section 19 does. It is noticeable that the prohibition is against the full blood Indian without respect to tribe. "Lands allotted to him" may well have been used merely as another expression for "allotted lands." If so, do allotted lands received by inheritance cease to be allotted lands? The un-

questionable intention to protect full blood Indians as a class, apparent throughout the sections, should prevent such a technical and strict interpretation of the term. As most of the land had but recently been allotted, it was natural for Congress to think and to speak of all of the land possessed by the full blood Indian as "lands allotted to him."

As has already been pointed out, we have unmistakable proof of the fact that Congress did insist upon protecting those of this incompetent class who possess surplus lands, to-wit, the Choctaws and Chickasaws, whose allotted lands, including surplus lands, amounted to no less than 320 acres apiece. (Act of July 1, 1902, ch. 1362, 32 Stat. 641, 642.) If the theory upon which Congress had enacted this legislation had been that, provided a full blood Indian owned allotted land in excess of the ordinary allotment of 160 acres, he should be at liberty to dispose of this land because not really necessary to his sustenance, it would have scarcely intentionally violated its previous agreement with the Choctaws and Chickasaws as to their surplus lands. Therefore, the theory upon which Congress must have enacted this legislation is, that a person so incompetent as a full blood Indian ought not to be allowed to dispose of even a part of his land, free from all restrictions, and that the mere fact that he happens to be the possessor of a large amount of land by allotment, inheritance or otherwise, is no reason for permitting him to be despoiled of a part of his patrimony.

Besides, in section 20 Congress clearly prohibited the leasing of allotted lands inherited by full blood Indians, except upon the approval of the Secretary of the Interior, and on other conditions therein specified, either indefinitely or for a period of 25 years. If the latter period is to be read into section 20, and it doubtless is, it must be by implication from section 19. That such a limitation is implied in section 20 is altogether probable, for prohibition as to leasing for an indefinite period would be unusual unless accompanied by a similar period as to selling.

The nature of the provision in section 20 implies that the twenty-five year period was intended to terminate the special restrictions against the leasing of allotted lands in the possession of the original allottee, or allotted lands received by inheritance.

The wording of the last sentence in section 22 implies that Congress conceived that it had already provided against alienation of allotted lands inherited by full blood Indians. The twenty-five year period had just been adopted by Congress and was deeply impressed upon its mind, as is shown by its failure to provide specifically for the termination of restrictions upon leasing. The reasons for believing that Congress intended to supersede previous restrictions have already been pointed out and are too cogent to be disregarded. The necessity, therefore, for finding the period, for which the prohibition against alienation of allotted lands inherited by full blood Indians is to apply, within the sections of the Act of April 26, 1906, is apparent. The implication of the twenty-

five year period, from section 19, is entirely reasonable and most appropriate. It corresponds to the period which has most frequently been adopted by Congress in respect to other Indians of other tribes, and it is not surprising, therefore, that Congress conceived a single statement of the twenty-five year period, in one section, sufficient to imply its existence in the other sections of the act.

However, from the first sentence of section 22 it is possible to derive the rule that the last sentence of section 22 prohibits the sale of allotted lands inherited from original allottees, except as therein provided, but does not prohibit the alienation of such lands inherited from the heirs or successors of such allottees. Such a rule, based as it were upon a presumed difference between the second and third generation, is not altogether unreasonable, but is much less satisfactory than the rule against alienation for the twenty-five year period, especially as it would destroy to some extent the unity of the system.

Doubtless Congress did intend to distinguish between original allotments and allotments, or parts thereof, received by inheritance; but this is no reason for holding that Congress intended to distinguish between the different tribes as to allotments inherited by their full blood members. It is quite in accord with the unity of the entire system to assume that Congress intended that full blood Indians, who possessed a great deal of land by reason of inheritance, should be trained in its disposition under rules and regulations prescribed by the Secretary of the Inte-

rior, so that they would ultimately be able to dispose of their lands free from all restrictions.

Again, if we approach the subject from a slightly different point of view we reach the same conclusion.

1. The decisive clause of section 22 reads: "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe." (34 Stat., 145.) This language is perfectly general. The preceding part of the section likewise is entirely general, saying that "The direct heirs of any deceased Indian of either of the five civilized tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent," and that guardians may be appointed and act for minors. On the face of the section we have a comprehensive rule for all conveyances otherwise than by will of an inherited allotment.

And indeed the contention of defendants in error at once appears artificial and arbitrary. Nothing in the wording of the statute fairly suggests the strange result of limiting the sentence concerning conveyances of inherited lands by full-bloods to conveyances made before August 8, 1907. The rest of the section certainly has no such limitation.

2. Defendants in error stand wholly upon the words "under this provision" in the final sentence of the

section, concerning conveyances by full-bloods. They say that, as section 19 in their interpretation does not apply to inherited lands and as the prior statute of June 30, 1902 (concerning the Creeks), limited its restraints to five years from the approval of the Creek Supplemental Agreement (viz., to August 8, 1907), the first part of section 22 which in general terms allows conveyances of inherited lands by those who have inherited them had no actual operation to sanction such conveyances after August 8, 1907—because they were already allowable after August 8, 1907. Therefore, defendants in error say, the phrase of the last sentence, "all conveyances made under this provision," must be held to apply only to conveyances made before August 8, 1907. It immediately appears that the contention is purely verbal, and that even as a matter of words it is artificial and altogether unnecessary. The legislature itself can hardly be deemed to have gone through such a circuitous process, with a result so different from what a first and simple reading of the section indicates. Another view of the language is more natural. In section 19 (even if that section be considered to relate only to conveyances by an original allottee) full-blood allottees were forbidden generally to make conveyances before April 26, 1931. Congress wished, however, that after the death of the original allottee all allotments should be alienable, even though the original allottee himself was a full-blood, unless the heirs themselves were full-bloods. That result was made plain by section 22, which was enacted as a

coordinate part of the new general plan—making clear the exact scope of section 19, even if it did not qualify what otherwise would have been the scope of that section. Had not the general statement been made in section 22 that all heirs except full-bloods of any allotment, though originally belonging to a full-blood, could alienate, it might well have been contended that the disability of the original full-blood allottee ran with his land and would affect all heirs of it, though not themselves full-bloods. The first sentence of section 22 is in effect a statement that the disability of the original allottee shall not run with the land, but that the power of an heir to alienate the land shall depend upon his own character as a full-blood or a mixed-blood. The rule thus established by section 22 was properly viewed by Congress as governing conveyances by heirs just as long as section 19 was to govern conveyances by original allottees; and therefore, in the real as well as the simple view of the matter, all conveyances by heirs before April 26, 1931, were contemplated by Congress as "made under this provision," *i. e.*, the declaration of section 22.

Putting the matter in another way, the first sentence of section 22 purports in words to cover all conveyances at any time thereafter by heirs, and to permit such conveyances. As a matter of words, therefore, all conveyances by heirs at any time thereafter were under that provision. And, as defendants in error stand upon the question of the literal meaning of the three words "under this provision,"

it is a sufficient answer to their contention that all conveyances by heirs between April 26, 1906, and April 26, 1931, are in words covered by the first sentence of section 22. Indeed, all such conveyances were covered by the first sentence of section 22 in law as well as in words—no less after August 8, 1907, than before; because the legislative consent to the conveyances given by section 22 was as real and sufficient as its assent by any prior statute.

3. Defendants in error speak of the sentence of section 22 concerning conveyances by full-blood heirs as "a proviso." The first answer to this intimation is that it is not true. The sentence is not even a proviso in form. It is a distinct and independent legislative command, just as much as any other part of the statute. Even if it were a proviso, however, it would be a proviso of section 22 itself—not of the Act of June 30, 1902, passed four years before. And as a proviso of section 22, the sentence concerning conveyances by full-blood heirs would be entitled to operation just as long as freedom of alienation by mixed-blood heirs was permissible under section 22, viz., until April 26, 1931.

4. A serious argument can, as we have seen, be made that section 19 but for section 22 would have to be construed as itself applying to conveyances by full-blood heirs. It is only section 22 that puts any considerable difficulty in the way of such construction. "Lands allotted to" the full-blood Indian might well be held to include any allotment which had come to be the property of the full-blood; espe-

cially as it clearly appears that the words "full-blood allottees" in section 20 concerning leases, plainly include full-blood heirs of allotments, and as the first proviso of section 19 concerning leases indisputably relates to "any lands other than homesteads," and as the last proviso of section 19 speaks in terms of "the original allottee" when he alone is meant. The question whether section 19 has any bearing, or but for section 22 would have any bearing, upon conveyance of an inherited allotment is quite immaterial, however; for even if section 19 has no such bearing, section 22 was enacted by Congress as a direct statement of the pertinent rules established concerning conveyances by heirs; and that section made the law as to such conveyances for the same period as the rules of section 19 were to continue, viz., until April 26, 1931. It is altogether immaterial whether section 22 qualified section 19 or merely covered a particular subject which section 19 would not have reached, even if it had stood alone.

The judgment of the court below should be reversed.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 60.

MARCHIE TIGER, PLAINTIFF IN ERROR,

vs.

THE WESTERN INVESTMENT COMPANY AND ELLIS H. HAMMETT, R. C. ALLEN, AND J. C. PINSON, COPARTNERS UNDER THE NAME OF COWETA REALTY COMPANY, DEFENDANTS IN ERROR.

SUGGESTIONS AMICUS CURIÆ IN SUPPORT OF CONTENTIONS OF DEFENDANTS IN ERROR.

S. T. BRANSON.
EVANS BROWNE.

In the Supreme Court

of the

United States

MARCHIE TIGER,
Plaintiff in Error.
vs.
THE WESTERN INVESTMENT COMPANY
AND
ELLIS H. HAMMETT,
R. C. ALLEN,
AND
J. C. PINSON,
Co-Partners Under the name of Coweta Realty Company,
Defendants in Error.

No.

SUGGESTIONS AMICUS CURIAE IN SUPPORT OF CONTENTIONS OF DEFENDANTS IN ERROR.

The statute, the construction of which is involved in this proceeding (Sec. 22 of the Act of April 26, 1906), is applicable to certain lands inherited by certain members of all of the Five

Civilized Tribes. This statute had its broadest application in its relation to the inherited lands in the Choctaw and Chickasaw Nations.

Because of the construction of said statute by the Department of the Interior and the concurrence in said construction by the courts and lawyers generally throughout the Choctaw and Chickasaw Nations large sums of money were invested upon the faith of such construction so given by the Department, the trial courts, and subsequently concurred in and confirmed by the opinion of the Supreme Court of the State of Oklahoma in the above cause.

These suggestions are made at the instance of a large number of persons resident of the Choctaw and Chickasaw Nations, who have invested their money upon the faith of the interpretation given by the Department of the Interior, trial courts and the Supreme Court of the State.

It is not the purpose of counsel to burden this court with an elaborate or extensive brief upon the question involved. Most elaborate briefs have been presented by counsel representing the parties to the litigation. Neither of these briefs, however, have taken into consideration the Departmental construction of this statute shortly after it became a law and which was accepted and became a rule of property of the Choctaw and Chickasaw Nations.

The brief of Plaintiff in Error considers this statute as though it was enacted especially for and applied to inherited Creek lands only. A

proper interpretation of this Act, if interpretation is in fact needed, can hardly be arrived at by considering the Act as applicable to the members of the Creek Tribe only. It must be considered in the relation and as applicable to the inherited lands of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles.

It is in this light that we propose to discuss it and particularly with reference to the Choctaws and Chickasaws. The brief of counsel for Plaintiff in Error is in itself, we believe, as evidenced by careful examination, a confession that the natural and proper interpretation of the provision is as construed by the Supreme Court of the State of Oklahoma.

It is easily apparent that counsel for Plaintiff in Error throughout their brief are laboring under the conviction that, to give to the provision in controversy the construction contended for by them, something other than the provision itself, and the other provisions of the Act in which it is found, must be considered. Pursuing this view of the matter, counsel proceeded to lay down a large number of abstract rules which may be or may not be correct either in general or in application to the particular matter under consideration.

The manner in which counsel for Plaintiff in Error interpret the provision in question disregards the language of the provision itself and undertakes to bring out of the tangled skein of

propositions laid down by themselves and rules of interpretation gathered here and there a meaning which could not be deduced from the language of the statute itself.

The method adopted is by beginning with one assumption, basing another assumption upon the correctness of the first; a third upon the correcting of the second preceding; a fourth upon the third preceding, and so on indefinitely.

During the time when the various legislative inducements relating to restrictions upon alienation of allotted and inherited lands of members of the Five Civilized Tribes were being enacted, including the act of April 26th, 1906, and legislation subsequent thereto, there were allotted lands of full-blood allottees in some one or more of the Five Civilized Tribes which were held free from restrictions upon alienation. There were also allotted lands in some one or more of the Five Civilized Tribes that were held subject to restrictions upon alienation imposed in the allotment agreement and grant. There were inherited Indian lands held in some one or more of the Five Civilized Tribes which were free from all restrictions upon alienation.

The period of restriction in each case being dependent upon the agreement under which the lands were allotted. For instance, in the discussion of the provision of the Act of May 27th, 1908, appearing on pages 42 to 44 inclusive of brief of Plaintiff in Error, the fact that said act had application to the conditions above set out

as found in each of the several Five Civilized Tribes, is disregarded. Both the Acts of April 26th, 1906, and May 27th, 1908, were blanket acts, dealing with all of the Five Civilized Tribes. It is hardly probable that all of the conditions dealt with in said act existed in any one of said tribes. One of the conditions would exist in one tribe, one in another and perhaps two or more in another.

For instance the surplus allotment of the Choctaw-Chickasaw full-blood descended subject to the restriction upon alienation that the same should not be sold for less than the appraised value during the existence of the tribal government.

Under the original Seminole Agreement, it has been always contended by the government that the inherited land of an allottee by blood did not become alienable until after the issuance of patent. This contention is based upon the wording of the agreement providing that "all contracts for sale, disposition or encumbrance of any part of the allotments made prior to the date of patent shall be void."

In the Cherokee Nation the homestead, under section 13 of the Cherokee Agreement, descended free from all restrictions upon alienation.

The surplus allotment in the Cherokee Nation is alienable at the expiration of five years from the date of the ratification of the Cherokee Agreement, which was August 12th, 1902.

Under section 15 it is affirmatively provided that the lands may be alienated five years after the issuance of patent. In any event the surplus allotment of a Cherokee by blood was subject to restrictions upon alienation by the heirs at the time of the passage of the Act of April 26th, 1906. Whether such lands became alienable five years after August 12th, 1902, or not until the expiration of five years after the issuance of patent has never been judicially determined.

This statement of the matter is made here in order to show that in the Cherokee Nation there were lands which descended free from restrictions upon alienation and also lands which descended subject to restrictions upon alienation.

Restrictions Upon Alienation in the Choctaw and Chickasaw Nation.

The provisions of the Choctaw-Chickasaw Supplemental Agreement under which the lands allotted in severalty to the members of said tribe and freedmen are found in sections 11, 12, 13, 15, 16 and 22. These sections are as follows:

Section 11:

> "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw

and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations, to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Section 12:

"Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Section 13:

"The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 14:

"When allotments as herein provided have been made to all citizens and freedman, the residue of lands not hereing reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

Section 15:

"Lands allotted to members and freedman shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold as herein provided."

Section 16:

"All lands allotted to members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: one-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years; in each case from date of patent: Provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expira-

tion of the Choctaw and Chickasaw tribal governments for less than its appraised value.

Section 22:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died intestate subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled, if living, shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Before considering the effect of the restrictions imposed upon alienation in these various provisions, we desire to call the court's attention to certain declarations of law made in reference to the construction and effect to be given statutes imposing restrictions upon alienation. In the case of **Doe vs. Wilson,** 23 Howard, 463, Mr. Justice Catron, speaking for this court, uses the following language:

> Although the government alone can purchase lands from an Indian Nation, it does not follow that when the rights of the nation are extinguished, an individual of

the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited its sale.

The rule as declared by this court in the case of **Taylor vs. Brown,** 147 U. S., 646, is stated in the following language:

> The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeit his estate by violating it (1 Prest. Est., 477), and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage and entitled to special protection **(Pickering vs. Lomax,** 145 U. S., 310; **Felix vs. Patrick,** 145 U. S., 317, 330), yet the proviso in question may fairly be held to have been adopted in view of general principles.

In **Jones vs. Meehan,** 175 U. S., page 16, this court quoted with approval as following from one of its previous decisions:

> The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but, as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which, for the purposes of this controversy for possession. The United States held the ultimate title,

charged with the right of undisturbed occupancy and perpetual possession in the Indian nation, with the exclusive power in the government of acquiring the right. Although the government alone can purchase lands from an Indian nation, it does not follow that, when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable unless the treaty had prohibited its sale. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold and inhabited by a white population, among whom the Indians could not remain.

Continuing, this court said:

> The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation.

These quotations might be multiplied indefinitely, but we deem it sufficient to merely call the court's attention to the following cases which tend to support our conclusion:

Quinney vs. Denney, 18 Wis., 485.

Crews vs. Burcham, 1st Black., 352.

French vs. Spencer, 21 How., 228.

Stark vs. Starr, 6 Wal., 402.

Lamb vs. Davenport, 18 Wal., 307.

Ryan vs. Carter, 93 U. S., 78.

Best vs. Doe, 18 Wall., 112.

Oliver vs. Forbes, 17 Kan., 113.

Clark vs. Lord, 20 Kan., 390.

Francis vs. Francis, 99 N. W., 14; 203 U. S., 233.

United States vs. Torrey, 154 Fed., 263.

United States vs. Moore, 154 Fed., 712.

New York Indians vs. United States, 170 U. S., 1.

It will be observed, therefore, from an examination of the Supplemental Agreement above quoted that the homestead of the allottee, without regard to quantum of Indian blood, descended free from all restrictions upon alienation, the prohibition being against alienation during the lifetime of the allottee not exceeding 21 years from date of certificate of allotment.

The same is true with reference to the allotment of the Chickasaw and Choctaw freedmen, restrictions thereon being imposed in language

identical to that imposing restrictions upon alienation of the homestead of members of the Choctaw-Chickasaw tribes.

As to when the surplus lands of a Choctaw or Chickasaw allottee become alienable in case of his death, there is a difference of opinion. It is contended on the one hand that the restrictions continue for the time limited in the statute regardless of the death of the allottee; and on the other, that the only limitation contained is that the lands may not be alienated by the heirs during the existence of the tribal government for less than the appraised value. In either event there would be a restriction upon alienation after the death of the allottee.

In the one instance the lands could not be alienated until the expiration of the time limited, and in the other they could be alienated at any time after the death of the allottees subject to the restrictions that they could not be sold for less than the appraised value.

It will be observed it is only as to lands allotted to members that restrictions are imposed upon the right to alienate. Lands allotted in the name of a deceased member, under section 22, and which descend to the heirs of such deceased member under the laws of descent and distribution of the State of Arkansas are not subject to restrictions upon alienation.

The Supreme Court of the State of Oklahoma had this question before it for determination in the case of **Hancock vs. Mutual Trust**

Company, 103 Pac., 566. The opinion in that case is a full review and discussion of all of the above mentioned sections of the Choctaw-Chickasaw Supplemental Agreement.

The court, after a most careful consideration, arrived at the conclusion, based upon the decisions of this court, that the lands selected under section 22 of the Choctaw-Chickasaw Supplemental Agreement, in the name of a deceased allottee descended to the heirs of such allottee free from all restrictions upon alienation. That decision was accepted by the parties as a correct interpretation of the statute.

Section 22 of the Act of April 26, 1906, will not bear the construction placed thereon by the counsel for Plaintiff in Error.

Section 22 of the Act of April 26th, 1906, the construction of which is involved in this controversy, is as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in the sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory, and in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors

may reside or in which said real estate is situated, upon an order of suc hcourt made upon petition filed by guardian. **All conveyances made under this provision** by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. (Black type ours.)

What is meant by the term "conveyances made under this provision?" Is it not equivalent to a declaration that it applies only to conveyances that could not lawfully have been made except for said provision. In other words, the language limits the provision, requiring approval by the Secretary of the Interior to such conveyances as are made under and by virtue of the authority thereof.

It is immaterial whether this be treated as a proviso or as independent legislation, whether it relates to and limits the section or the entire act.

There is no other part of the entire act other than section 22 to which it could relate or operate in connection with. Section 19 deals with the alienation of allotted lands. Section 20 with leases. Section 21 makes provision for reversion in case of default of heirs. Section 22 deals only with the right of alienation of inherited lands. Section 23 deals with the right to dispose of real estate by will.

These subjects were no doubt advisedly legislated upon in separate sections because it was the purpose to apply different rules to each.

We respectfully submit that it was for Congress to say, within constitutional limits, what rule should control and that such rule may not be changed by the court, even though the court should be of the opinion that a better rule might have been prescribed. The construction of this provision contended for by counsel for Plaintiff in Error would have the effect of making the same read as follows:

> No conveyance by full-blood heirs of inherited land made pursuant to the authority or any agreement of law heretofore enacted or hereafter enacted, shall be valid unless the same shall be presented to and approved by the Secretary of the Interior.

The language of the statute limits the requirement of the Secretary's approval to "conveyances made under this provision by heirs who are full-blood Indians." Counsel for Plaintiff in Error say that the court should interpolate into the section such language as will make it include conveyances made under all other provisions of all other statutes and agreements.

We respectfully submit that this is not a proper interpretation of the act.

It is urged that if it was the duty of Congress to protect the full-blood against voluntary alienation of his allotted land, that a like duty rested upon Congress with reference to inherited land. That such duty, resting upon Congress, the law must be construed to accomplish that purpose, whether the language of the act will justify or not.

It might be suggested in this connection that the evident purpose of Congress was to preserve for the full-blood a home sufficiently large to support himself and possibly his family. But it should not be overlooked that every member of the family of a full-blood received an allotment.

The purpose of allotment, in qualifying the allottee, to handle his own property and cope with his neighbors, would hardly be aided by prohibiting him from exercising ownership over any part of the lands that may come to him otherwise than by allotment.

Apparently the purpose of Congress was to provide a home for the full-blood and not make a land baron of him.

We do not deem it necessary to follow the various contentions made in the brief of counsel for Plaintiff in Error. These contentions have been fully met by the brief filed on behalf of the Defendant in Error. We desire, however, before concluding, to call the court's attention to the departmental construction of the particular act in controversy.

Shortly after this provision became a law the Department of the Interior was called upon to interpret the same. There was submitted to the Department for its approval a conveyance of the inherited homestead of Robert Watson, deceased. The homestead of the said Robert Watson, deceased, had been sold through the United States court for the Southern District of the

Indian Territory on application of the guardian of Willis and Richard Watson, minors, and the only heirs of the said Robert Watson, deceased.

The Secretary submitted the matter to the Assistant Attorney General, who wrote an elaborate opinion interpreting this statute. The Secretary approved this opinion. This was while the matters touching the enactment of the legislation were fresh in the minds of the departmental officials.

The Department of the Interior is always jealous of its authority over the Indian tribes and Indian affairs. That authority is not relinquished except when the department is convinced beyond controversy that it cannot be lawfully asserted. The opinion of the department, therefore, in construing section 22 above quoted against its own authority is the strongest evidence of the fact that such provision would not bear any other construction. The opinion of the Assistant Attorney General as approved by the Secretary is in full as follows:

Department of the Interior.
Office of Assistant Attorney General.
Washington.

January 29, 1907.

24788-1906.
Int. Ter. Div.

The Secretary of the Interior.

Sir: You have submitted the papers relating to the approval of the deed executed under the direction of the United States Court by the curator of the estate of Willis

and Richardson Watson, minor, full-blood Choctaw Indians, covering one hundred and twenty acres of land originally allotted to their father, Robinson Watson, saying:

"In view of sections 19, 20 and 22 of the Act of Congress approved April 26th, 1906, (34 Stat. 137), your opinion is requested in the matter."

The land in question being the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, the northeast quarter of the northwest quarter of the southwest quarter, the north half of the northeast quarter of the southwest quarter and the northwest quarter of the northwest quarter of the southwest quarter, section 25, T. 5 S., R. 1 E., in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead, May 28th, 1903, and homestead patent executed in his favor was filed for record in the office of the Commission to the Five Civilized Tribes Sept. 18, 1905.

It is alleged in the petition for the sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the lands belonging to the estate of their deceased father, Robinson Watson, March 31st, 1906, after due notice thereof, C. D. Wortham, as curator filed in the United States court for the Southern District of the Indian Territory, application to sell said real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12th, 1906, and appraisers were

appointed to view and appraise the property. They appraised it for $1,200.00 and the property was sold May 12th, for $1,100. This sale was subsequently approved by the court and deed executed thereon May 14th, 1906. In view of the provisions of section 22 of the Act of April 26th, 1906, the department has been asked to give its approval to this sale.

In the Act of June 28th, 1898, (30 Stat. 495, Sec. 29), it was provided that each allottee of the Choctaw and Chickasaw Tribes of Indians should select from his allotment a homestead of 160 acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the Act of July 1, 1902, (32 Stat. 641), it is provided that each member of said tribes shall at the time of selecting his allotment designate as homestead land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nation 'which shall be inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment, and separate certificates and patent shall issue for said homestead.'

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restrictions upon alienation.

The Act of April 28th, 1904, (32 Stat. 573), contains the following provision:

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman or otherwise.

These minors and their lands, held by them free from any restrictions upon alienation, were within the jurisdiction of the United States court as described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to sections 19, 20 and 22 of the Act approved April 26th, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to expiration of said period, be removed by acts of Congress." This provision related to allottees and has no bearing on the question here presented. Section 20 refers exclusively to leases and rental contracts and does not effect this case. Section 22 reads as follows:

That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the land of the tribe to which he or she belongs, or belonged, may sell and convey the lands inherited from such decedent; and if there be both, adult and minor heirs of such decedent, then, such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court of the Indian Territory. And in case of the organization of a state or territory, then by the proper court of the county in which said minor, or minors, may reside, or in which said real estate is situated, upon an order of such court made upon application filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

This section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It cannot, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the Act of July 1, 1902, supra, is

that they may be alienated one-fourth in acreage in one year; one-fourth in three years, and the balance in five years from the date of patent. There is no permissable construction of said section 22, except that it applies so far as the Choctaws and Chickasaws are concerned to these surplus lands which descend to the heirs burdened with the restrictions upon alienation and not to the homestead which descend to the heirs freed of all such restrictions.

If this is the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are returned herewith.

Very respectfully,

FRANK L. CAMPBELL,

Assistant Attorney General.

Approved:

January 29th, 1907.

E. A. Hitchcock.

Secretary.

The statement in this opinion with reference to this Act that "it cannot, however, be held to apply to heirs who receive their inheritance free of all restrictions, is in our judgment, a brief, terse and correct interpretation of said provision.

This construction that the provisions of this

act did not extend to heirs who receive their inheritance free of all restrictions was accepted and acted upon by all purchasers of inherited lands. It has become a rule of property in the state; it is a correct interpretation of the statute. It is entitled to the very highest consideration because it is the interpretation by the department whose duty it was to execute the law.

It is respectfully submitted that the Supreme Court of the State of Oklahoma could not have decided the case differently or interpreted the statute involved so as to permit the Plaintiff in Error to recover without doing violence to the language of the act and all known rules of statutory interpretation.

Respectfully submitted,

S. T. BLEDSOE and

EVANS BROWNE,

FILED.
FEB 28 1911
JAMES H. McKENNE
CLE

In the

Supreme Court

of the

United States

October Term, 1910

No. 60.

MARCHIE TIGER, *Plaintiff in Error,*

vs.

THE WESTERN INVESTMENT COMPANY, ELLIS HAMMETT, R. C. ALLEN and J. C. PINSON, Co-partners under the firm name of THE COWETA REALTY COMPANY,
Defendants in Error.

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANTS IN ERROR.

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SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANTS IN ERROR.

May it please the Court:

In addition to what has been said in the original brief for defendants in error, we desire to call the Court's attention to the following:

First.

With respect to Section 23 of the Act of Congress, approved April 26, 1906, relied upon by counsel for

plaintiff in error, and the Government as indicating a general disability of full-blood Indians, whether the land was allotted or inherited from an allottee, we direct the attention of the Court to the fact that the limitation with regard to devising pertains to "real estate." In other words, a full-blood cannot disinherit by will the parent, wife, spouse, or child, with respect to any of his "real estate." "Real estate" means just what it says, and therefore covers and includes town property, or any other kind of real property, without regard to the source from which it was derived. While the right to make a will is neither a constitutional nor natural right, the limitation on the power to dispose of real estate by will affects all the land of the full-blood Indians, no matter from what source it comes, and Section 23, therefore, gives no light on this question.

Second.

Counsel for the plaintiff in error argues that Section 9 of the Act of Congress, approved May 27, 1908 (35 Stats. L., 312), in imposing restrictions on the alienation of inherited lands of full-bloods, shows a legislative construction of the prior law. They insist that Congress would not have undertaken to restrict the sale of inherited lands of full-bloods by Section 9 of said Act of 1908, unless such restrictions already existed. The other section relied upon contradicts this argument. The last sentence in Section 9 of the

Act of 1908 extends the provisions of Section 23 of the Act of April 26, 1906, to wills executed by members of the Five Civilized Tribes of one-half or more Indian blood, when such citizen of one-half or more Indian blood disposes of his homestead by will. In other words, no full-blood Indian, under Section 23, of the Act of April 26, 1906, can disinherit by will the wife, spouse, parent, or child, unless such will is acknowledged before and approved by a United States Commissioner or a Judge of the United States Court. Section 23 of said Act was confined to full-bloods, and no contention can be made that any limitation was imposed on mixed-bloods by the Act of 1906, with respect to disposing of their lands by will to whomsoever they saw proper, when such will was made after the restrictions expired under the provisions of the respective treaties made with the different tribes. Therefore, it is necessary to resort to the treaties to ascertain when restrictions expired on mixed-bloods, thus showing that the act of 1906 did not undertake to revise all the laws for all the tribes.

The first time any limitation was imposed requiring mixed-bloods of one-half or more degree of blood to obtain the approval of the United States Commissioner or Judge to their wills disinheriting their natural heirs, is found in the last sentence of Section 9, of the Act of 1908. We presume, therefore, the Government would argue that the Court should infer that the same limitation already existed on mixed-bloods,

or otherwise Congress would not have imposed this limitation on mixed-bloods with respect to wills in the last sentence in Section 9, of the Act of 1908.

Third.

We also direct the Court's attention to the last sentence in Section 19, of the Act of 1906, wherein it is provided that "all lands from which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the *original allottee*." This proviso was contained in Section 19 when it passed the House in the form the bill reached the Senate.

It, therefore, appears that Congress had in mind the protection of the allottee with respect to his individual allotment, and not with respect to land inherited by him. Under this proviso inherited land would be taxable when statehood intervenes. Statehood was then not only in contemplation of Congress, but was under actual consideration, and the Enabling Act was passed and approved by the President in less than sixty days after the Act of 1906, under discussion.

Congress had in mind the fact that the new State could not exist and maintain a government without the power of taxation. Lands restricted and in the name of the allottee as his individual allotment were protected from taxation. No protection against taxation was intended with respect to inherited lands, except where the inherited lands were inalienable under

the treaties. This proviso in Section 19 declares, "that all lands upon which restrictions are removed shall be subject to taxation, and the other lands (without regard to the degree of blood of the citizen), shall be exempt from taxation as long as the title remains in the original allottee."

It, therefore, necessarily results that resort must be had to the respective treaties or agreements with the tribes to ascertain what lands were unrestricted. In other words, a mixed-blood allottee in the Creek Nation remained under restrictions until August 8, 1907, and his allotment would not be subject to taxation prior to that date unless he died and the same passed to his heirs by inheritance. In the Seminole Nation the allotment of the mixed-blood would not be subject to taxation until the patent issued. To ascertain when lands become subject to taxation in the Cherokee Nation would require a resort to the Cherokee agreement of 1902. We mean the allotments of mixed-bloods.

Fourth.

Counsel for the appellant contends that the proviso to Section 22 of the said Act of Congress, approved April 26, 1906, to-wit: "All conveyances made under *this provision* by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," is a general, permanent, fixed and definite restriction against alienation by full-

blood citizens of all the tribes insofar as their inherited lands are concerned. We desire to urge upon the Court our contention that this proviso should not have such a wide and general application, but should be limited under the well settled rules of statutory construction. Counsel for the appellant contends that Section 19 prohibits alienation of the allotment of the full-blood for a period of twenty-five years, unless the restrictions are removed prior thereto by Act of Congress, and that Section 22 prohibits alienation of the inherited land by the fullblood for all time to come, unless the Secretary approves the conveyance. We contend that the whole of Section 22 is an enabling and not a restricting section. That it confers rights and does not destroy them. We contend that Section 22 imposed no new restriction, but when read in the light of the treaties with the Five Tribes amounts to a removal section, and not a prohibitory section. Under Section 16 of the Supplemental Agreement with the Creeks, alienation was prohibited without regard to the degree of blood for a period of five years. Under that section, however, the Creek citizen could sell and convey both his allotment and lands inherited by him from other citizens, with the approval of the Secretary. And if Section 22 is to be construed alone with the view to the Creek Agreement, it would be equivalent to nothing further than a re-enactment of Section 16 of the Supplemental Agreement insofar as inherited lands are concerned—

that is, Section 22, so far as full-blood Creeks are concerned, is a re-enactment of Section 16 of the Supplemental Agreement.

However, Section 22, insofar as full-blood Cherokees and full blood Seminoles are concerned, operates to confer upon them the right and power to alienate their inherited lands, provided they obtain the approval of the Secretary of the Interior to the deed of conveyance. There is no provision in the Choctaw and Chickasaw Supplemental Agreement (32 Stats. L., 641), for the alienation of either the allotted or inherited lands of Choctaws and Chickasaws with the consent of the Secretary. In other words, the Supplemental Choctow and Chickasaw Agreement did not confer upon the Secretary of the Interior any authority to approve and consent to the conveyances by Choctaws and Chickasaws. Neither do Sections 14 and 15 of the Cherokee Agreement (32 Stats. L., 716) provide for alienation of either the allotted or inherited lands of Cherokees with the consent of the Secretary. That is to say, the Secretary was not granted by any provision in the said Cherokee Agreement power to approve or consent to the alienation and conveyances of the Cherokee lands or inherited lands in the Cherokee Nation. The Seminole Treaty, approved by Act of Congress of July 1, 1898 (30 Stats. L., 567), declares "all contracts for sale, disposal, or encumbrance of any part of any allotment made prior to date of patent shall be void." No provision is found in the said

Seminole Agreement, as approved by Congress, conferring any authority or power upon the Secretary to consent to or approve the alienation and conveyance by Seminoles of either their own allotments or allotments inherited by them. Thus we find that on April 26, 1906, at the time the Act of Congress now under consideration was approved, the Secretary of the Interior had no authority to consent to the alienation of any inherited land in any of the Five Civilized Tribes, except the Creek Nation.

Without Section 22, inherited lands by full-bloods in none of the Five Tribes, except the Creek Nation, could be conveyed with or without the approval of the Secretary prior to the expiration of the period of restrictions fixed in the respective agreements. We, therefore, contend that the provision, that is, the last sentence in Section 22, operated exclusively in those tribes where the Secretary did not before and under the existing treaties and agreements have jurisdiction to consent to the alienation of inherited lands, and we contend that insofar as the Creek Nation is concerned, Section 22 is nothing further than a mere reenactment of the restriction contained in Section 16 of the Supplemental Agreement.

As heretofore remarked, under Section 16 of the Supplemental Agreement with the Creeks, both allotted and inherited lands could be alienated upon obtaining the approval of the Secretary. Insofar as the Creek Nation is concerned, full-bloods were left by

Section 22, insofar as their inherited lands are concerned, in the same status fixed by Section 16 of the Supplemental Treaty Agreement. Section 22 begins with the declaration "that the adult heirs of any deceased Indians of either of the Five Civilized Tribes, whose selection has been made, etc., etc., may sell and convey lands inherited from such decedent;" this section, down to the proviso, that is the last sentence, operated to remove the restrictions from adult heirs, without regard to the degree of blood, and this removal operated in all the tribes.

If Section 22 had provided "that the adult heirs of deceased Indians, except full-blood heirs, of either of the Five Civilized Tribes . . . . may sell and convey inherited lands, etc.," then full-blood heirs in the Cherokee Nation and the Seminole Nation would have remained powerless to convey even with the approval of the Secretary, because the treaties conferred no such authority upon the Secretary. It was, therefore, the purpose of Congress to enable full-blood heirs in all tribes to sell during the term of the limitations and restrictions imposed by the treaties; provided, that during the term of the treaty restrictions they obtain the Secretary's approval to the conveyance. If the Government's construction is sound, then full-blood heirs are denied the power to alienate their inherited lands for all time to come, whereas, said full-bloods can alienate their individual allotments at the end of twenty-five years.

Fifth.

The history of this legislation has been fully traced and set forth in the briefs filed by counsel for plaintiff in error, and by counsel for defendants in error. It is a significant fact that nowhere in the debate in the Senate is there any mention made of the necessity of restricting the alienation of inherited lands. Senator McCumber, the author of Section 19 as it finally passed both Houses, said on the floor of the Senate:

> "If that is true, it seems to me there is ground for holding that we ought to protect them; and I say again to the Senator, you can talk all you are a mind to about civilizing the Indians the same as you would a white man—by making him get down and work himself up—but he never will do it. You can take a white man, and he may be a pauper, and that may be for his best interest, because it places him upon his own responsibility. But you must remember that he has an inheritance of thousands of years, which has given him the energy, the determination, the industrial character to build himself up. The exact opposite has been the history of the red man; and, because he has those characteristics, we may never hope to make him the equal of the white man. If we will admit that, and proceed to make the very best Indian we can out of him, and observe our moral duty, remembering that we have stolen the continent from him—if we do our duty and continue his poor life as long as we can, *we will always provide a home for him; give him a home upon terms* under which he can not sell it, so that he can come back to it whenever he finds that there is no

other place on the face of the earth to lay his head.

Mr. President, that is the spirit which backs the introduction of this amendment, and it is the only spirit that has controlled in seeking to make this amendment a law by passing it through both Houses of Congress, in order to protect the Indians, in the future, at least, for as many years as possible."

(40 Cong. Rec., p. 5176.)

The purpose of the amendment thus offered by Senator McCumber, prohibiting the alienation of the allotments for twenty-five years, is to preserve the Indian a home, and the Senator said "that is the spirit which backs the introduction of this amendment, and it is the only spirit that has controlled in seeking to make this amendment a law." The allotment of the full-blood is, in every tribe, sufficient in amount and fertility for a home for himself and family. And we might say that on an average these individual allotments are more in quantity and quality than the average farm owned by the thrifty farmers in the large majority of the States. In the Creek Nation every allottee received 160 acres; in the Choctaw and Chickasaw Tribes each member was allotted land equal in value to 320 acres of the average allottable lands of the Tribes; in the Seminole Nation the lands were to be designated and divided into three classes, the first to be appraised at $5.00 per acre, the second at $2.50 per acre, and the third class at $1.25 per acre. The domain of the Nation was divided among the members

of the tribe so as to give each an equal share thereof in value, and each allottee was required to designate one tract of forty acres to be held as a homestead in perpetuity and to remain inalienable and non-taxable forever. The Seminoles received on an average of —— acres. The Cherokees were allotted land equal in value to 110 acres of the average allottable lands of the Cherokee Nation, and required to select therefrom 40 acres as a homestead, which was made inalienable during the life time of the allottee, not to exceed, however, twenty-one years. It was not the purpose of Congress to restrict the alienation of these lands so as to permit the Indians to become land barons and build up by inheritance a vast area of territory to remain a playground for jack rabbits and greyhounds. in this very case, Marchie Tiger, plaintiff in error, inherited 640 acres, and with his own allotment of 160, therefore possessed 800 acres.

Senator McCumber and other Senators, who made upon the floor of the Senate profert of their knowledge of the habits and characteristics of the full-bloods, well knew that the full-blood would never till or cultivate any more land than that required to constitute a home, and for this reason we believe that it is apparent from the debate, as well as the history of the entire Act through Congress, that no intent to prohibit the alienation of inherited lands was intended. Congress knew that statehood was not only inevitable, but immediate, and must have contemplated that some of

these lands must become taxable and must change hands in order to maintain and sustain a prosperous State. The Enabling Act, providing for the organization of the State of Oklahoma, was approved by the President on June 16, 1906, less than sixty days after the approval of this Act under consideration.

Constitutionality of Act of 1906 Extending Restrictions.

However, we insist that if this Court holds that Section 22, of the Act approved April 26, 1906, extended restrictions against the alienation of the lands in controversy, then such act is unconstitutional and void. The first question for determination, therefore, is, were these full-blood Indians citizens of the United States, and entitled to all the rights, privileges and immunities of other citizens of the United States, at the time the said Act of Congress was passed and approved?

The Five Civilized Tribes have been dealt with by Congress through special legislation, applicable alone to the Five Civilized Tribes, and through various treaties and agreements negotiated with the separate Nations composing the Five Civilized Tribes. The general Indian legislation enacted by Congress from time to time, has not been applicable to the Five Civilized Tribes. They have been treated by Congress and the executive branch of the government as a class to themselves.

They have been treated as the Five *Civilized* Tribes. For over forty years, each of these tribes, though a dependent nation, has maintained a local government, republican in form, and patterned after the system in vogue in the various States. They each had a written constitution, which provided for the three co-ordinate branches of the government, to-wit: Executive, Legislative and Judicial. There are no blanket Indians among these tribes, though counsel for the Government refers repeatedly in his brief to blanket Indians. Each of these tribes long ago abandoned the ancient customs of the aboriginals. There were no roving bands in the chase and on the hunt. They cultivated their lands, and maintained their towns and villages. Under their constitution their National Council enacted laws for their internal government, which laws were compiled, printed and distributed among their judges and legislators. Some of the Nations called their chief executive a Governor, others, Chief, and another Principal Chief. They had their district judges, whose jurisdiction over subject matter and territory was well defined by written law. They had their Supreme Courts, whose jurisdiction was defined by their constitutions and the acts of their legislative bodies. As exhibit to this brief we herewith print copies of the constitutions of some of the Nations.

In the year 187—, under authority of an Act of Congress, the Missouri, Kansas & Texas Railway company constructed its main line of railroad north and

south through the Indian Territory, traversing the Cherokee Nation, the Creek Nation, and the Choctaw and Chickasaw Nations. This road connected the City of St. Louis, Mo., with Fort Worth and Dallas, in the State of Texas. This road was the advance agent of a higher degree of civilization among the tribes than had been attained previously. Other railroads were built from time to time, till Indian Territory, at the time it was admitted into the Union as a part of the State of Oklahoma, had an average of railroad mileage with most Southern and Western States.

With the consent of the tribes from time to time, the white man became a more frequent visitor, and by inter-marriage and adoption, began the process of amalgamation. Considering the education, intelligence, religion and civilization of the members of these tribes, statehood was inevitable. *Not statehood for the territory occupied by these tribes, but statehood for the citizens of the tribes.* Not statehood for a certain defined territory included within geographical boundaries, but statehood for the *people* and *inhabitants* of the Five Civilized Tribes. Not statehood for certain geographical territory, out of which the Indian Tribes were to be segregated and confined to a United States reservation, but statehood for the Indians—statehood for the Five Civilized Tribes. The history of the Five Civilized Tribes points unerringly to their eventual elevation into a sovereign State. Their history is unparalleled by the Six Nations, or any other Nation, Tribe,

or Confederated Tribes. Congress recognized this in the act of March 3, 1893, wherein, by Section 16, the policy of the United States was announced. It may have been a new policy, it may have been wrought by evolution, but the conditions existed and the announcement of Congress was nothing further than the expression and declaration of an existing status. Section 16, of said Act of Congress of March 3rd, 1893, is as follows:

> "The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three Commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union, which shall embrace the lands within said Indian territory."

This Act further directed the Commissioners to procure the consent of the Indians to an allotment of their lands in severalty; to procure by cession to the

United States for such price and upon such terms as might be agreed upon, the lands of the tribe not found necessary to be allotted or divided; to make proper arrangements for the investment or holding of the same by the United States, etc., and, among other things, further declares the governmental policy in the following words:

> "But said Commissioners shall, however, have the power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interest and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a territory of the United States, with a view to the admission of the same as a State in the Union."

These Commissioners were directed by this Act of Congress, to obtain an allotment of the lands among the individual citizens of the tribes. This was the paramount object of Congress, and the announced, the avowed purpose and policy of eventually extinguishing the tribal governments by converting these people and their territory into a State.

These Commissioners were not directed to negotiate with these tribes, or any of them, with a view of their segregation upon an Indian reservation; they were not to negotiate with these tribes, or any of them, for the purpose of removing the Indians to some other country, as had been done by the government through treaties made back in the 30's. The purpose

that Congress had in mind was no secret, but was announced in solemn legislative act, and made known to the Indians. Every step taken was to accomplish that avowed purpose.

Congress thereafterwards passed various Acts enlarging the powers of the Commissioners, in order that they might accomplish the extinguishment of the tribal governments, and bring about allotment of the lands to the individual citizens of the tribes. Congress passed an Act June 10, 1896, whereby the Commission was further authorized and directed to proceed at once to hear and determine all applications of persons who might apply to them for citizenship in any of said Nations, and to make up a roll of citizenship in each Tribe, which was necessary to the allotment of the lands. Congress passed another Act June 7, 1897, and then the Act of June 28, 1898, entitled, "An Act for the Protection of the People of the Indian Territory, and for other purposes," commonly known as the first Curtis Bill. The Commission was authorized to lay out townsites, and a townsite commission was created for each separate government townsite.

Further legislation with respect to making up the rolls of citizenship was contained in this bill, and further and larger powers given to the Commission. United States Courts were established in the Indian Territory, and their jurisdiction enlarged from time to time, until they had full and complete jurisdiction over the property and personal rights of the members

of all the tribes, as much as ten years before statehood. The tribal courts were abolished in 1898, and the United States Courts took complete civil and criminal jurisdiction. These courts were held in the midst of the tribes, and were local, thus giving the Indians an intimate association and observation of our method of administering justice. This was a part of the policy adopted in the transition from tribal life to State and Federal citizenship. It was the period of training and probation. In the meantime, the Commission negotiated an agreement with the Choctaws and Chickasaws, dated April 23, 1897, and ratified by Act of Congress, approved June 28, 1898, commonly known as the Atoka Agreement. By this agreement, the Choctaws and Chickasaws consented to the allotment of their lands in severalty among the individual members.

On the 16th day of December, 1897, an agreement was negotiated with the Seminoles, providing for the allotment of their lands in severalty. This agreement was supplemented by an agreement, negotiated on the 7th day of October, 1899. An agreement was also negotiated with the Commissioners representing the Creek Nation in 1898, but the same failed of ratification by the tribe.

Thereafter, and on March 8th, 1900, what has heretofore been referred to as the Original Agreement with the Creeks, was negotiated by the Commissioners, and ratified by Act of Congress, approved March 1, 1901. This Act provided for the allotment of the do-

main of the Creek Nation among its citizens in severalty. Thereafter, and in 1902, a Supplemental Agreement was negotiated with the Creeks, which was ratified by Act of Congress, approved June 30, 1902, and ratified by the tribe on May 25, 1902.

A joint agreement was made and negotiated with the Choctaws and Chickasaws in 1902, which was approved by Congress on April 1, 1902, and ratified by the two Nations at an election held September 25, 1902.

An agreement was negotiated with the Cherokees in 1902, ratified by Act of Congress, approved July 1, 1902, and ratified by the Cherokees at an election held August 7, 1902.

All of these agreements clearly show that the Indians consented to the allotment of their lands, and being an intelligent race of people, must be presumed to have known the announced and expressed purpose of Congress in creating the Dawes Commission, and clothing it with power to represent the United States in bringing about the dissolution of their respective tribal governments, in order that statehood might eventually be granted to these Indians. These respective agreements vary in some of their particulars, but in the essential things are practically the same. They accomplished by consent the paramount object. No force, no duress, no coercion, no fraud and no deception was practiced upon the tribes; nor have the tribes, or their sentimental friends, charged that the Federal

government obtained these agreements by fraud, duress or coercion.

From time to time, Congress passed other Acts, conferring on the Interior Department and its accredited representatives, the Commissioners to the Five Civilized Tribes, powers and means with which to accomplish this avowed purpose and expressed policy of the United States.

It is unnecessary to review all of this legislation, but we confidently assert that no judicial mind can scan these various agreements and Acts of Congress, without arriving to the positive conclusion that the United States and the Indians themselves were concurrently, peacefully and amicably carrying out, step by step, and link by link, a joint and several policy. And that joint and several policy upon the part both of the dominant parties, the United States and the dependent parties, the Indians, was eventual statehood, not alone for the white intruders, but for the Indians themselves.

All of these efforts undoubtedly looked forward to the ultimate formation of a State, including the territory of the Five Civilized Tribes, with all of the responsibilities and citizenship, including benefits and burdens of State government, with full submission to the jurisdiction of the State to be thereafter created.

For many years prior to 1893, the Indian Territory had, in fact, if not in name, ceased to be Indian country. According to the census of 1890, there were

180,182 persons residing in the Indian Territory, of whom 51,279 were Indians, 110,254 whites, and 18,636 negroes. In 1900 the population of Indian Territory had increased to 392,000, of which 302,680 were whites, 36,852 negroes, and 52,500 were Indians. In 1890 the Indians constituted 28.5 per cent of the total population; in 1900, 13.4 per cent of the total population, and in 1907, 9.1 per cent of the total population. Therefore, for many years prior to the making of the Allotment Agreements, and prior to the conferring of citizenship upon the members of the Five Civilized Tribes in Indian Territory, they had been practically living among white people. The conditions in Indian Territory were not in the slightest degree similar to those exsting in Indian reservations, *where the policy of exclusion was followed.*

In recognition of the conditions existing among the Five Civilized Tribes in the Indian Territory, and of the progress made in the entering into the agreements for the allotment of lands in severalty, there was introduced into Congress in 1890, a bill reading as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that Section 6, Chapter 119, United States Statutes at Large, page 390, is hereby amended as follows, to-wit: After the words, 'civilized life,' in line 13 of said Section 6, insert the words, 'and every Indian in Indian Territory'."

This Act was duly passed and approved by the President on the 3rd day of March, 1901 (31 Statutes,

1447). The bill conferring citizenship upon every Indian in Indian Territory, and which became a law March 3rd, 1901, was House Bill No. 10701. When this bill reached the Senate, it was referred to the Committee on Indian Affairs, which reported the same back with favorable recommendation; said report being No. 2483 of the Fifty-sixth Congress, Second session, and was made on the 28th day of February, 1901, and ordered to be printed.

The reasons for the passage of this bill are fully set forth by the report of the Committee on Indian Affairs of the House of Representatives, which report is as follows, and is adopted as the report of your committee:

> "The Committee on Indian Affairs, to whom was referred the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, No. 24, beg leave to submit the following report, and recommend that said bill do pass without amendment.
>
> The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time, protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.
>
> Under the operation of the statute referred to, the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Ter-

ritory the Quapaws, the Senecas, the Wyandottes, the Ottawas, and the Shawnees, and even the Modocs, have all been granted the valuable right of United States citizenship. None of these Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights, they should be given the right of United States citizenship immediately. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of the usual personal business engagements which are taking place daily on a vast scale in Indian Territory, without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the Act 'For the Protection of the People of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring suits in the United States Courts to recover possession of property; they are

permitted to vote, and under existing laws, they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

It will be observed that it was the purpose of the bill, as understood by the Senate Committee and as reported to the Senate, to place the Indians of Indian Territory, "*upon a level and equal footing with the great population with whom they are now intermingling.*"

Section 6 of the General Allotment Act, as amended, the Amendment being in *italics*, is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in Indian Territory*, is hereby declared to be a citizen of the United States, and is entitled to

all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It is suggested in a brief, purported to be filed on behalf of the United States (page 27), that, notwithstanding there are four distinct classes of Indians referred to in this Statute as amended, that there is some concealed tie between the phrase, "who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life," and the amendment, "and every Indian in Indian Territory," so as to limit the amendment to Indians who have taken up the habits of civilized life "and lived separate and apart from any tribe." We say "concealed tie," because it is not apparent from the language used that such was the purpose.

Prior to the amendment, there were three distinct classes. The amendment made a fourth class, or it meant nothing.

First—Every Indian born within the territorial limits of the United States, to whom an allotment had been made under the provisions of said Act.

Second—Every Indian born within the territorial

limits of the United States, to whom an allotment had been made under any other law or treaty.

Third—Every Indian born within the territorial limits of the United States, who had, voluntarily, taken up within said limits, his residence separate and apart from any tribe of Indians therein, and had adopted the habits of civilized life.

Fourth—Every Indian in the Indian Territory.

There is not the slightest thing in the language used, or in the natural or usual construction thereof, that would tend to indicate that the phrase, "every Indian in the Indian Territory," was intended to be or is limited by the previous phrase, "who has taken up his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life."

There is not the slightest conflict between Section 6, as amended, and Section 8. Section 6 deals alone with the subject of citizenship; not with that of allotment. It deals with the individual Indian, and not with the territory occupied by the tribe, or with the allotment thereof in severalty. Section 8 simply provides that the provisions of the Act shall not extend to the *territory* occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, etc. In other words, that the *territory*, that is to say, the lands of these tribes, shall not be allotted under the provisions of the Act. So natural and inevitable is this construction, that the

author of the marginal notes of the United States Statutes at Large affixed opposite Section 8, the words: "lands excepted."

Considering the language of the original Act and the language of the Amendment, it is impossible to escape the conclusion that Congress intended to make every Indian in Indian Territory, by the passage of said Amendment, a citizen of the United States, with all "the rights, privileges and immunities of such citizens." When this amendment is considered in connection with the conditions existing in the Indian Territory, the promise of citizenship contained in the Act of March 3rd, 1893, the progress in the negotiation of allotment agreements and the report of the Senate Committee, it is incomprehensible to suppose that Congress intended to do anything else than to confer, immediately and unconditionally, full citizenship, with all the rights, privileges and immunities thereof, upon every Indian in the Indian Territory. And that such was the construction placed by Congress itself upon this Act at the time it was under consideration, appears from the debate thereon in the House on June 5th, 1900, appearing in Volume 33, Congressional Record, No. 8, page 6769, which is printed as Appendix A hereto, and from the report of the Senate Committee in recommending the passage of the bill above set out, and also from the debate in the House of Representatives, on March 9th, 1906, when the House had under consideration what finally became the Act of May 8th, 1906, as the same

appears in the Congressional Record, Vol. 40, No. 4, page 3598, the principal part of the discussion being printed as Appendix B hereto.

Speaking with reference to the possible conflict of Section 8 of the General Allotment Act, as originally enacted, with Section 6 thereof, as amended by the Act of March 1, 1901, Judge Campbell, in the case of the *United States* v *Allen* (171 Federal, 907-919), uses the following language:

> "It is contended that the amendment of 1901 made the Act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the Act that was amended. It is clear that Congress meant to say, and did say, by the amendment:
>
> > 'Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.'
>
> The language is clear, and its intent and meaning cannot well be mistaken, and if, in the other parts of the Act as originally passed, there are found provisions in conflict with the clear purpose and intent of the amendment, repealed by implication; . . . . "

If there is any repugnancy between the two provisions, the same is undoubtedly repealed by the subsequent enactment, though not mentioned therein.

St. Louis, Iron Mountain and St. Paul Ry. Co. v. *Paul*, (—— Arkansas, ——; 173 U. S., 404.

A most elaborate consideration of these various acts conferring citizenship upon the members of the Five Civilized Tribes is found in the case of the *United States* v. *Allen* (171 Federal, 907-917), where the conclusion is reached in language which carries conviction, that the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities as such. The judgment in this case was appealed from and was reversed by the Circuit Court of Appeals for the Eighth Circuit by the majority opinion, in the case of the *United States* v. *Allen* (179 Federal, 13), but in the opinion of the Court of Appeals for the Eighth Circuit, by District Judge Amidon, it is apparently conceded that the members of the Five Civilized Tribes are all citizens of the United States and have fee simple title to their lands (179 Federal, 19).

Judge Amidon, however, was of the opinion that the authority of the *Heff* case had been limited by the decision in the *Celestine* case (215 U. S., 278).

We desire to call the Court's attention to the fact that under the Special Act of Congress authorizing an appeal, that an appeal has been prosecuted from the judgment of the Circuit Court of Appeals in the last-mentioned case to this Court, and is now pending on the docket hereof, under the style of *Mullen and Jansen* v. *The United States*.

The Court's attention is also invited to the dissenting opinion of Circuit Judge Adams (179 Federal, 23).

In fact, so far as we are advised, no court has ever held or intimated either directly or indirectly, that the Act of March 1st, 1901, did not confer upon the members of the Five Civilized Tribes full citizenship, with all the rights, privileges and immunities accompanying the same.

It is, however, contended in this case, that conferring citizenship upon the members of the Five Civilized Tribes, with *all* the rights, privileges and immunities thereof, did not operate to sever the relation of guardian and ward, so far as such relation may have existed, if at all, between the United States and the members of the Five Civilized Tribes.

Mr. Justice Brewer, speaking for this Court, in the *Heff* case (197 U. S., 488), with particular reference to Section 15 of the Act of March 3rd, 1893, says:

> "Of late years a new policy has found expression in the legislation of Congress—the policy which looks to the breaking up of tribal relations, the establishment of the *separate Indians* in *individual* homes, *free* from *national guardianship* and charged with *all* the *rights* and *obligations* of *citizens* of the United States. Of the power of the Government to carry out its policy there can be no doubt. It is not under Constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to *assume* and to be *subject to* all the *privileges* and *burdens* of one *sui juris*." (*Italics* are ours.)

As illustrative of legislation evidencing such a purpose, reference is made to Sections 15 and 16 of the Act

of March 3rd, 1893 (27 Statutes, 612-645), and to the Act of Congress of June 28th, 1898 (30 Statutes, 495-513).

Continuing, Justice Brewer uses the following language:

> "We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the *policy of the Government has changed*, and that an effort is being made to relieve some of the Indians from *their tutelage* and *endow them* with the *full rights of citizenship*, thus *terminating between them and the Government the relation of guardian and ward*, and that the statute we are considering is not altogether novel in the history of Congressional legislation." (*Italics* ours.)

It was insisted by the Solicitor General in the *Heff* case, as shown by the report thereof (197 U. S., 496), that,

> "the citizenship of Indian allottees is not inconsistent with guardianship of Congress,"

and that,

> "if these Indians are citizens at all, they are not citizens of full competence, just as minors are citizens and subject to rights and duties as such, but are not *sui juris* in respect of age, and (as) other classes of citizens under personal or legal disabilities are not *sui juris* in other respects."

The decision of this Court is clearly a denial of both of these contentions. These contentions, re-casted, however, are the basis of the authority of the Government to extend restrictions upon alienation. It was

further insisted in the *Heff* case (p. 408), that the authority to regulate commerce with foreign nations and among the several States and with Indian Tribes authorized the regulation of commerce with the individual Indian. That contention is responded to by this Court, in the following language:

> "Can it be that because one is an Indian, with only Indian blood in his veins, he is to be forever one of a special class, over whom the Government may at its discretion, assume the rights of guardianship, which it has once abandoned, and this, whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

It is further said in this same opinion (509):

> "But the fact that the property is held subject to a condition against alienation, does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with condition subsequent. A minor may not alienate his lands, and the proper tribunal may, at the instance of the rightful party, enforce all restraints upon alienation."

We deem it unnecessary to go into an elaborate review of subsequent cases relating to this subject.

Some of the more important ones, and which sustain the contentions made by the defendants in error, are:

U. S. v. *Dooley et al.*, 151 Federal, 697;
Ex parte Vilas, 139 Federal, 70;
United States v. *Hall*, 171 Federal, 214;
United States v. *Copp*, 110 Federal, 160;
United States v. *Augus*, 153 Federal, 671;
Ex parte Savage, 158 Federal, 205;
United States v. *Ross*, 160 Federal, 132.

The best summary we have been able to find of what constitutes the privileges and immunities of citizens of the United States is found at page 65 of Brannon's Fourteenth Amendment.

THE ACT OF 1906,

In So Far as It Undertakes to Extend Restrictions Against Alienation, Is Unconstitutional and Void.

Congress was so doubtful of the wisdom of the effort to extend restrictions that, on June 30, 1906, the Senate passed a resolution authorizing the appointment of a select committee, consisting of five Senators, for the purpose of investigating and making a full and complete report—together with their conclusions and recommendations—to the Senate, with respect to the condition of affairs in the Indian Territory.

Congress was not only doubtful of the wisdom of the legislation, but was so doubtful of its constitutionality that it passed an Act, approved March 1st, 1907, authorizing William Brown and Levi B. Gritts, Cherokee citizens, to institute a suit in the Court of Claims, and prosecute the same on appeal to this Court, for the purpose of testing the constitutionality of this legislation, as well as of other Acts of Congress affecting the affairs and property rights of the Cherokee citizens.

William Brown and Levi B. Gritts instituted such

suit against the United States in the Court of Claims, and, in due time, the case reached this Court, and was docketed for the October Term, 1910, as No. 331; argued and submitted on November 30, 1910; and dismissed in an opinion by Mr. Justice Day. This Court held that Congress had no power to direct the Courts to advise it with respect to the constitutionality of its legislation, and that the judicial power of the Court had not been invoked and could not be under that statute.

With respect to the Act extending restrictions, we assert there is no precedent sustaining the validity of such legislation. No decision of this Court or any other has been pointed out by the able counsel for the Government.

As said in our original brief and in oral argument, the status of the Five Civilized Tribes is quite different from that of any of the other tribes in the United States with whom Congress has sought to deal. The domain of the Creek Nation, out of which these allotments were made, was conveyed to the Creek Nation as a political entity by patent duly issued from the United States, by President Millard Fillmore, on the first day of August, 1852, which patent was issued in accordance with the provisions of a prior treaty made with the Creek Tribe. A copy of the said patent is herewith printed as Exhibit F to this brief, and as announced by the decisions of this Court, as well as the United States Circuit Court of Appeals for the Eighth Circuit, the title conveyed by this patent passed

to the Creek Nation as a tribe and vested in it as a political society, and not in its various members as joint tenants in common or as communal property.

Stephens v. *Cherokee Nation,* 174 U. S., 488;
Ligon v. *Johnson,* 164 Fed. Rep., 670.
Shulthis v. *McDougal,* 162 Fed. Rep., 331; 170 Fed. Rep., 529.

The patent thus issued to the Creek Nation in 1852 was for the express consideration for the removal of the Creek Tribe, or Muskogee Nation, from east of the Mississippi to this country.

The *habendum* clause is as follows:

> "Now, know ye, that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee (or Creek) Tribe of Indians, the tract of country above described. To have and to hold the same unto the said tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them."

This vested in the tribe as a political entity an estate best defined as a base fee.

United States v. *Reese,* Fed. Cas. No. 16,137;
Cherokee Nation v. *Southern Kansas Railroad Co.,* 33 Fed. Rep., 900;
United States v. *Rogers,* 23 Fed. Rep., 658;
Cherokee Nation v. *Southern Kansas Railroad Co.,* 135 U. S. Rep., 641-661.

Or, it may be that the contingent remainder to the

United States in the event of abandonment was a condition subsequent.

Holden v. *Joy,* 17 Wallace, 211-253; 21 L. Ed., 523.

Whatever rights the United States, as the dominant party, may have had in the domain of the Creek Nation, and the other tribes, passed absolutely and unconditionally from the United States to the respective allottees under the plain and unequivocal provisions of the various treaties and agreements made with the tribes providing for the allotment in severalty of the public domain of the nations.

In the Original Agreement, negotiated with the Creeks and ratified by Act of Congress, approved March 1, 1901, and subsequently ratified by the tribe May 25, 1901, it is expressly provided as follows, by Section 23:

> "Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the Principal Chief with blank deeds necessary for all conveyances herein provided for, and the Principal Chief shall thereupon proceed to execute in due form, and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation, and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.
>
> "The Principal Chief shall, in like manner,

and with like effect, execute and deliver to the proper parties deeds of conveyance in all other cases herein provided for (meaning town lots, etc.), and all lands or town lots to be conveyed to any one person, shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

"All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee (meaning allottee), of all the right, title and interest of the United States in and to the lands embraced in his deed.

"Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment . . . The transfer of the title of the Creek tribe to the individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company any right, title or interest in and to any of the lands in the Creek Nation. All deeds when so executed and approved, shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee; and such records shall have like effect as other public records."

A like provision will be found in the Cherokee Agreement, ratified by Act of Congress, approved July 1, 1902. We refer to Sections 58, 59, 60, 61 and 62 of said treaty. Similar intent was expressed with respect to other tribes.

Confining ourselves, however, to the Creek Nation,

we assert that there is no escape from the conclusion that the execution of a patent by the Principal Chief, and its approval by the Secretary of the Interior, operated to vest in the allottee the absolute and unconditional fee simple title against the Creek Nation, as a political entity and the United States as the dominant proprietor. No trust reservation was made, either in the treaties, the Acts of Congress or the patents. The United States did not take the legal title in trust for the use and benefit of the allottee. The United States has no more title, either legal or equitable, in its own right, or in trust, to these lands after they were allotted and patents issued, than it has in the title to the lands and estates of any other citizen of the State of Oklahoma, the State of Massachusetts, or any other state.

As pointed out in our original brief, the restrictions against alienation did not debase the title below a fee simple. In support of this proposition, we cited *Libby* v. *Clark*, 118 U. S. Rep., 250, and *United States* v. *Payne Lumber Company*, 206 U. S. Rep., 467.

We also call the Court's attention to the opinion of this Court by Mr. Justice Brown, in *Schrimpscher* v. *Stockton*, 183 U. S. Rep., 290, wherein the Court said:

> "Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The Government thus

> passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

Thus we have the original title in the tribe under the patent of 1852, with subsequently thereto, and in 1901 and 1902, agreements entered into between the United States and the tribe, whereby it was provided and mutually agreed that the lands belonging to the tribe as a political society should be allotted and conveyed by the tribe with the consent of the United States, to the individual citizens of the tribe. In these Creek agreements of 1901 and 1902, certain restrictions against alienation were provided for. These restrictions against alienation were incorporated in the grants, or patents, to the individuals. Not that it was necessary to incorporate the restrictions in the grants in so many words, but the grants or patents to the individuals carried with them the restrictions imposed in the law providing for the allotments and the patents therefor.

We, therefore, contend that Congress, acting alone or in conjunction with the defunct tribal government, has no power to further burden the grant consummated by issuance of patent. Congress had no power in 1906 to diminish the fee simple title conveyed by the

patents issued to Marchie Tiger for his own allotment and to his brothers and sisters during their lifetime for their allotments. No case has been cited wherein such legislation has been sustained. The Constitution of the United States authorizes Congress to regulate commerce with Indian tribes, and the courts have held that the Indian people, *prior* to the grant of citizenship, were domestic dependent aliens, "in a state of pupilage," "owing no allegiance to the State, received no protection from the State," and that "the duty of protecting the Indians carries with it the power to protect."

Cherokee Nation v. Georgia, 5 Peters, 1;
Worcester v. *Georgia*, 6 Peters, 512;
Elk v. *Wilkins*, 112 U. S. Rep. 94;
United States v. *Kagama*, 118 U. S. Rep., 375;
Stephens v. *Cherokee Nation*, 194 U. S. Rep., 477.
Lone Wolf v. *Hitchcock*, 187 U. S. Rep., 553;
Cherokee Nation v. *Hitchcock*, 187 U. S. Rep., 294.

In all these cases, however, and in all other cases heretofore considered by this court, the Indians were either not citizens of the United States or, if citizens of the United States, held nothing further than a trust patent from the United States—that is, the United States reserved the legal title and issued to the Indian a trust patent which was, in legal effect, nothing further than a certificate or declaration of trust. Such trust patents, as said by this court in one case, were

not in legal effect patents, and that the use of the term "patents" was inappropriate.

We, therefore, contend that no relation of guardianship and ward existed between the United States and Marchie Tiger, the plaintiff in error, at the time this act was passed by Congress and approved April 26, 1906. There undoubtedly existed in the Federal government, as the dominent power, the authority to proceed with the administration of the tribal property and the tribal affairs.

We assert the following:

First. The grant of absolute and unconditional citizenship to the Indians in the Creek Nation and in the other nations of the Five Civilized Tribes, by the act of Congress approved March 1st, 1901, destroyed the Federal guardianship over the person. The Federal Government had no other and further authority to legislate with respect to the person of the Indians of these Five Tribes than it possessed with respect to white citizens of the United States residing in the Indian Territory.

Second. The allotment and subsequent issuance of a patent, vesting fee simple title in the Indian, struck down the guardianship of the Federal Government over all that property thus segregated from the tribal domain and vested in the Indian citizen.

The allottee was vested with the fee simple title subject to a limitation contained in the grant prohib-

iting the alienation of the allotment for a *definite* and *fixed* period, to-wit, five years from and after the ratification of the agreement. This fixed period, as fixed in the agreement or treaty, expired on August 8, 1907. Any legislation undertaking to extend this limitation against alienation necessarily destroys the vested property right then existing in the allottee.

> "When vested rights are spoken of by the courts as being exempt from legislative interference, they mean those rights to which a party may adhere, and upon which he may insist, without violating any principle of sound morality."
>
> "A vested right is an immediate, fixed right of present or future enjoyment. Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest."
>
> "A vested right is defined to be an immediate fixed right to present or future enjoyment, or where the interest does not depend on a period or an event that is uncertain."
>
> *Words & Phrases, Vol. 8, pp.* 7307-7308.

The law as embodied in the original and supplemental agreement with the Creek tribe, under which the allotments were made and the patents issued, fixed definitely the period of time during which the allottee could not alienate. At the end of that fixed and definite period, the *power* to alienate would spring into

existence. The *right*, however, to alienate at the end of the period during which the power to alienate was withheld, vested immediately upon the allotment and the issuance of patent. There is a distinction between the *right* to alienate and the *power* to alienate. The power was withheld and denied for a definite period. The allotment and the patent were made and issued under the law fixing that definite period, and therefore made a part of the contract or a part of the grant or title. But, however, the *right* to alienate was also fixed under the same law withholding the *power* to sell for the definite period. The right to alienate at the end of the five years vested at the time the allotment was made and the patent issued. The right was immediate and fixed, and was not in abeyance and was not suspended. The right existed and vested when the patent was issued. That is to say, the right to alienate at the end of the five years was a fixed, vested right accruing at the time the allotment was made and the patent issued. The right was continuous while the power to alienate was suspended for a definite term.

It is true, the courts have held that restrictions against alienation are not incompatible with citizenship, but, in every one of those cases, restrictions against alienation depended for their validity upon the very law providing for the allotment and the granting of title. An individual or a corporation can deed land to an American citizen and, in the deed, suspend the power of alienation for a definite period, that is,

for five or ten years. Such disability to alienate inheres in the title and not in the individual.

It is contended by the Government that the act of 1906, extending the restrictions, is valid and constitutional because it is for the benefit and protection of the Indian. Our reply to that is that the plaintiff in error in this case is not an Indian under the law. He is a citizen of the United States and, at present, a citizen of the State of Oklahoma. He is an Indian by race, but not an Indian by citizenship. He is a citizen of the United States and, under the Act of March 1st, 1901, has at all times since that date been entitled to all the rights, privileges and immunities of other citizen of the United States.

It is contended that unless the full-bloods are prohibited from alienating their lands, they will dissipate their estates, become paupers and, therefore, a charge upon the Government. Upon this argument, counsel contend that the public welfare requires that they be prohibited for twenty-five years from selling their lands. We might reply to this argument by giving an historical review of the aboriginals as the owners and possessors of the American Continent. We assume that the gentlemen now contending for this legislation would have looked with holy horror upon the early settlement of the North American Continent by European countries. However, if the white man had not crossed the ocean and landed on these shores, this country would still be covered with the primeval forests. The inhabitants would still live on wild meat

and roasted corn. The painted warrior would still go forth to battle with his tomahawk and his bow and arrow. When we remember that our forefathers purchased all of Manhattan Island for trinkets worth not over $24, are we to hang our heads in shame? Are we sorry our ancestors ever came here and founded this great government, the light and glory of the world?

If the Indian is incompetent to cope with the white man now, after being intimately associated with the white race in the Indian Territory for over sixty years, he will not be any more competent at the end of twenty-five years from April 26, 1906. Especially is this true if the Government is to continue his guardian and deny him the power to sell any of his land. How can a commercial exile acquire, either by observation or experience, the ability to cope with the white race if the Government is to remain his guardian for twenty-five years? The Five Tribes have merited the name of Civilized Tribes. The first newspaper published in Indian language was published by the Cherokees when they were in Georgia. The old "Cherokee Phoenix" was launched upon the tempertuous sea of journalism by the Cherokees before the year 1830. Hung upon the walls of their old council house at Tahlequah, the capital of the Cherokee Nation, now in Oklahoma, will be seen the pictures of the leading chiefs of that nation, and we believe they compare favorably with the white race in appearance.

There seems to us to be a glaring inconsistency

in the policy of the Federal Government when we consider the Act of Congress under consideration and the Enabling Act, providing for the organization of Indian Territory and Oklahoma Territory into a state, passed less than sixty days after this act extending the restrictions against alienation.

If the full-blood Indians are incompetent as a class to sell or convey either their inherited lands or their own allotments, it is incomprehensible to us why they they should be so soon granted the power to vote and hold office in the State of Oklahoma and, thus, take part in making the laws for this new State. Some of these Indians were in the Constitutional Convention. A Choctaw Indian is now Speaker of the House of Representatives of the State of Oklahoma; a Chickasaw is now a member of Congress; and a Cherokee represents this State in the United States Senate. A large number of them hold office in Oklahoma.

As heretofore said, each of these tribes has a written constitution patterned after the constitutions of our states. We herewith print in the appendix to this brief a copy of the written constitution of the Creek Nation and a copy of the written constitution of the Cherokee Nation, and would print a copy of the constitutions of the Choctaws and Chickasaws but they are too long and the court will see from the constitutions of the Cherokee Nation and the Creek Nation a fair sample of the constitution of the other nations.

All these citizens of the Five Tribes, regardless

of their degree of blood, are *sui juris* and may bring and maintain suits in their own names. They may invoke the jurisdiction of our courts, both State and Federal. Full-bloods can do this as well as mixed-bloods.

Y-Ta-Tah-Wah v *Rebock*, 105 *Fed.* 257.
In Re Celestine, 114 *Fed.* 551.
Bird v *Terry*, 129 *Fed.* 472.
Wo-La-Note-Tke-Tynin v. *Carter*, 53 *Pac.* 106.
Ain-Nlus-Oke-Shig v *Beaulieu*, 107 *N. W.*, 820.
Bern-Way-Bin-Ness v *Eshelby*, 91 *N. W.* 291.
Moore v *Wa-me-go*, 83 *Pac. Rep.* 400.
Stephenson v *Christy*, 42 *S. W. Rep.* 418.

We also desire to call your attention to the act of Congress approved June 28, 1898, (30 Stat. at L. 495). Section 26 of this act provides:

> "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Section 28 provides:

> "That on the first day of July, 1898, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act heretofore authorized by any law in connection with said courts, or to receive any pay for same; . . . . Provided, that this section shall not be in force as to the Chickasaw, Choctaw and Creek Tribes or Nations until the first day of October, 1898."

Section 42 of the original Creek Agreement, ap-

proved March 1st, 1901, (31 Stat. at L. 861), is as follows:

> "No act, ordinance, or resolution of the national council of the Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof, except appropriations for the necessary incidental and salaried expenses of the Creek government as herein limited, shall be of any validity until approved by the President of the United States. When any such act, ordinance, or resolution shall be passed by said council and approved by the Principal Chief, a true and correct copy thereof, duly certified, shall be immediately transmitted to the President, who shall, within thirty days after received by him, approve or disapprove the same. If disapproved, it shall be so indorsed and returned to the Principal Chief; if approved, the approval shall be indorsed thereon, and it shall be published in at least two newspapers having a bona fide circulation in the Creek Nation."

Sections 16 and 17 are as follows:

> "46. The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.
>
> "47. Nothing contained in this agreement shall be construed to revive or re-establish the Creek courts, which have been abolished by former acts of Congress."

We, therefore, contend that the Creek Nation as a political society was practically stripped of all of its

power as a political government and existed thereafter only in name. Its existence in name and form was preserved for the purpose of aiding the United States in closing up the tribal affairs and completing the administration of the estate of the tribe. Its council could enact no law except with the approval of the President, and its courts could enforce no law and, in fact, were abolished, and none of the laws of the Nation could be enforced in any of the United States courts. Thus, we have the form without the substance.

In reference to the contention of counsel for the plaintiff in error, that the Creek Nation through an act of its national council consented to and ratified the act of Congress approved April 26, 1906, extending the restrictions, we desire to call the court's attention to sections 1 and 2 of article 8 of the Creek Constitution. Said article 8 is as follows:

> "Sec. 1. No laws impairing contracts shall be passed.
>
> "Sec. 2. No laws taking effect upon things that occurred before the enactment of the law shall be passed."

The Constitution of the Creek Nation is now in the government archives and in the possession of the Interior Department, and should, therefore, be judicially noticed by this court.

The act of the national council of the Creek Nation in undertaking to destroy the vested rights of the

allottees accruing under patents already issued, was violative of article 8 of the Creek Constitution. The language of article 8 of the Creek Constitution is simple, but, nevertheless, quite plain and effective. It provides that "no laws taking effect upon things that occurred before the enactment of the law shall be passed." The act of the national council of the Creek Nation was, therefore, in violation of the Constitution of the Creek Nation. The Constitution of the Creek Nation was the fundamental law of the Nation and by virtue of it alone the national council of the Creek Nation existed. The national council of the nation was not created by Act of Congress but created and organized under and by virtue of the Constitution of the tribe.

We are not going to burden this brief with a long discussion on the question of vested rights and constitutional law. We challenge counsel for the plaintiff in error to place their hands upon either a decision of this court, or upon a clause in the Constitution, sustaining the validity of the legislation now in question. We desire to call the court's attention to the fact that the Federal Government is a government of enumerated powers, limited and prescribed by the Constitution. The Federal Government cannot extend its authority and jurisdiction except where the right is granted by the Constitution. From whence did Congress derive this power to strike down the vested right to alienate at a fixed period? What clause in the Con-

stitution confers upon Congress the right to deny to an American citizen the power to alienate and convey his property? What provision in the Constitution supports such legislative assumption? We have been unable to find it and, therefore, contend that no such power exists.

In discussing the powers of the Federal Government, Justice Woods, in *United States* v *Harris* 106 *U. S.*, 629-644, said:

> "We pass to a consideration of the merits of the case. Proper respect for the co-ordinate branch of the government, requires the courts of the United States to give effect to the presumption that Congress will pass no act, not within its constitutional powers. This presumption should prevail unless a lack of constitutional authority to pass the act in question is clearly demonstrated. While conceding this, it must, nevertheless, be conceded that the government of the United States is one of delegated, limited and enumerated powers. *Martin* v *Hunter*, 1 *Wheat.*, 304; *McCullough* v *Moore*, 4 *Wheat.*, 316; *Gibbons* v *Ogden*, 9 *Wheat.*, 1. Therefore, every act Congress must find in the constitution some warrant for its passage. This is apparent by reference to the following provisions of the constitution: Section 1 of the first article, declares that all legislative powers granted by the constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with the grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the constitution in the governmnet of the United States, or

> in any department or officer thereof.' Article 10 of the amendments to the constitution declares that 'powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively and to the people.'"

Mr. Justice Story, in his commentaries on the constitution, says: "Whenever, therefore, the question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is proper or incident to the expressed power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." Citing Sections 1243, Virginia Reports and Resolutions, January, 1800, pages 33-34; President Monroe's exposition and message of May 4, 1822, page 47, 1 Tuck. Bl. Com. App., 287, 288; 5 Marsh. Wash. App. N., 3; 1 Hamilton's Works 117, 121.

> "Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and are constitutional limitations upon the exercise of the sovereign powers. There is vested right in property which one owns and it cannot be legislated away. A vested right is property as tangible things are when they spring from contracts or the principles of the common law."
>
> *Sutherland on Stat. Cons., Vol. 2, Sec.* 671.

An act of Congress is not due process of law when it undertakes to divest a private citizen of his property, either for public or private interest. We hardly deem it necessary to cite authorities to sustain our contention that Congress has no authority under the constitution to, by one fell stroke of the pen, pass a law divesting the plaintiff in error of his property right in the land in controversy as granted to him under the patent issued by virtue of the agreements with the Creek Tribe.

It is argued by the Government that the Indian is not testing the constitutionality of the legislation, that the Indian is not denying the power of the Federal Government to extend the restrictions, and that the plaintiff in error concedes the constitutionality of the Act of Congress in controversy. Our reply to that is—that the plaintiff in error exercised his option to dissent from that legislation, and question its validity, when he conveyed the land in controversy to our clients. He refused to be bound by the legislation when he executed and delivered to the defendants the deeds he now seeks to set aside. That election is irrevocable, and we take it that this court will not seriously consider that argument of counsel for the plaintiff in error.

Let us back to the question of due process of law, however. In his celebrated argument before this court, in the Dartmouth College case, 4, *Wheat.* 519, Mr. Webster said:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern Society. Everything which passes under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish a union of all powers in the Legislature. There would be no general law for courts to administer. Administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative decrees and judgments, not to declare the law or administer the justice of the country."

Cooley's Const. Lim. 503.

Sutherland, in his notes to the constitution, in discussing the fifth amendment now under consideration, says:

"The right to acquire, hold and enjoy property is protected by this clause, and the protection extends to all property whether real or personal."

Sutherland's Notes Const., p. 649.

It is true that this court has incidentally held

that there is no provision in the Federal Constitution prohibiting Congress from passing laws imparing contracts. Yet no decision can be found wherein this court has ever upheld an act of Congress where such act of Congress interferred with vested rights. Neither has any act of Congress impairing the obligations of contracts been upheld. The court, in all the cases we have examined, has merely mentioned the fact that there is no express inhibition denying the power of the Federal Government to impair the obligations of contracts. However, such inhibition against the power of the Federal Government to impair the obligations of contracts is in the spirit of our institutions and is breathed throughout the lines of our Constitution.

The fact that such power was expressly conferred with respect to the passage, by Congress, of a general bankruptcy law is strong evidence that the framers of the Constitution understood that the general inhibition was at least implied. It is evident that the framers of the Constitution understood that Congress had no such power; otherwise, the express grant of such specific power with respect to bankruptcy laws would likely not have been conferred. The inhibition against such power by Congress is necessary for the preservation of the principles which have been the birthright and inheritance of every English subject. These principles crossed the Atlantic with the colonists and were transplanted and established in our fundamental law at least by implication, and, while there is no express inhibition against the impair-

ing of contracts by acts of Congress, yet such an act will be in contravention of the spirit of our institutions and will unquestionably be declared null and void by this court.

This court, in the case of *Garfield* v *Goldsby*, 211 *U. S. Rep.* 262, recently said:

> "But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power."

The effort by Congress, as evidenced by the act of April 26, 1906, to declare all full-blood Indians incompetent—and thereby strike down their vested right to alienate and dispose of their property—is an arbitrary exercise of power and has no place in our government. If any of these Indians are incompetent, the probate courts of the State of Oklahoma have full and ample jurisdiction to appoint guardians for the management and preservation of their estates.

It is not claimed that all of the full-bloods are incompetent, and we do not claim that all of the full-bloods are competent. Neither would be claim that all of the white people in Oklahoma are competent to attend to their business affairs. We know a number of white men, apparently of ordinary intelligence, who have gone broke financially, dealing in lands in that State. Their misfortune, however, is no reason for the arbitrary declaration by the Legislature that no full-blood white man in Oklahoma shall buy any lands until after the expiration of twenty-five years from the date of the passage of such act.

Cases Cited in Support of the Constitutionality of the Act by the Court of Claims Are Not Applicable.

The first case cited by the Court of Claims in support of its contention is that of *Lone Wolfe* v *Hitchcock*, 187 U. S., 553-567, which was a suit to restrain the allotment of lands to members of the Kiowa and Comanche Tribes of Indians on the ground that the Secretary was proceeding under an Act of Congress in violation of a previous treaty made with the Tribes, providing that their lands should not be allotted until a majority of all of the members of the Tribe had voted therefor. It was further insisted that a majority of the Tribes had not so voted and that the United States had amended the treaty after its ratification by the Indians without their knowledge or consent.

The Kiowas and Comanches were not located in the Indian Territory, were not citizens of the United States, and the property was tribal property. The relief sought by the Indians was denied. The authority of the United States to so deal with the matter in controversy was by the opinion of the court especially limited to tribal lands, in the following paragraph of the opinion (567):

> "The Indians who had not been fully emancipated from the control and protection of the United States are subject, at least, so far as the

tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw* v *United States*, 119 U. S., 1, 27, and *Stephens* v *Cherokee Nation*, 174 U. S., 445, 483."

Therefore, in the case of *Lone Wolf* v *Hitchcock*, neither *citizens* of the United States nor their individual property was being dealt with.

The next case cited is that of *Cherokee Nation* v *Hitchcock*, 187 N. S., 294, which involved the authority of the Secretary of the Interior to lease *tribal lands* of the Cherokee Nation pursuant to and in accordance with an Act of Congress. The authority of the Secretary to make such lease was sustained upon the ground that the land of the Cherokee Nation was *tribal property*, held by the Nation in its tribal capacity, and that Congress is vested with authority to take measures to make the tribal property productive and to secure therefrom an income for the benefit of the tribes. In this instance Congress was simply dealing with tribal relations and tribal property, and not with an individual citizen of the United States and his individual property.

Another case cited by the Court of Claims in support of its contention is that of *United States* v *Rickert*, 188 U. S., 432, being a suit instituted in the name of the United States to restrain the collection of state taxes upon the improvements located upon lands allotted under the general allotment act of 1887, and on certain personal property furnished by the United States and

used for the cultivation of such lands by the allottees. The case turned principally upon the rights acquired by the allottee under the general allotment act and the obligations assumed by the United States. A quotation from the opinion, found in the decision of the Court of Claims, is as follows:

> "The granting of citizenship does not affect the acquiring of title to land allotted to the Indians nor is a restriction against alienation inconsistent with citizenship."

This court in the Rickert case was speaking about restrictions upon alienation imposed in the Act under which the allotments were made, and not restrictions after citizenship had been granted and an unconditional grant in fee acquired.

Another case cited by the Court of Claims in support of its conclusions is that of *United States v. Thurston County, Nebraska*, 143 Federal, 287. This was a suit instituted by the United States to enjoin Thurston County, Nebraska, from collecting taxes on certain moneys deposited in a bank by the order of the Secretary of the Interior. These moneys were proceeds of of the sales of inherited lands as to which the United States had obligated itself to hold "for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his death, of his heirs." The heirs had been permitted to sell on condition that the proceeds of the sale should be deposited to their respective

individual credits in a bank selected by the Commissioner of Indian Affairs, subject to their respective checks, not to exceed ten dollars in any one month. In no instance, had the twenty-five years, during which the United States had undertaken to hold the allotments expired. It was held that these trust funds stood in the same relation as the lands for which they were sold, and were not subject to taxation by the state. We quote as follows from the opinion:

> "Allotted lands were held by the United States for the benefit of those to whom they were assigned and their heirs under the acts of August 7, 1882, and February 18, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partook of the nature of the originals and stood charged with the same trust."

It is not believed that this decision, even remotely, sustains the opinion of the Court of Claims.

Another case cited by the Court of Claims in support of its decision is that of *Dick v United States*, 208 U. S., 340 and 353, to the point that "the authority of the state can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

That case involved a prosecution for violation of the Act of 1892, prohibiting the sale of intoxicating liquors to Indians. In reference thereto the Court said:

> "If this case depended alone upon the federal

> liquor statute forbidding the introduction of intoxicating liquors into the Indian country, we would feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words, 'Indian country,' to embrace any body of territory in which at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. *Bates v. Clark*, 95 U. S., 204; *Ex Parte Crow Dog*, 109 U. S., 556, 561.
>
> "But this case does not depend upon the construction of the federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Perce Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Perce Indians, and those retained as well as those allotted to the Indians (which embraced all the lands in the original Reservation), should be subject, for the limited period of twenty-five years, to all federal laws prohibiting the introduction of intoxicants into the Indian Country."

This case, therefore, involved the question of jurisdiction to punish for a crime under the peculiar provisions of the agreement between the United States and the Nez Perce Indians, entered into long before the admission of the state. It involved no question of the taking of property without due process of law.

It is believed that all of the cases that will be cited in support of the constitutionality of this legis-

lation will be of litigation founded upon trust patents relating to the control of tribal property and on the question of jurisdiction to prosecute for the sale of intoxicating liquors to Indians.

The case of *United States* v. *Celestine*, 215 U. S., 278, is sometimes used to support conclusions of the character of those found in the judgment of the Court of Claims. The distinction suggested in the Celestine case with reference to the fact that in that particular case the Indian had not, by the terms of the allotment act, been remitted to the jurisdiction of the state, would be immaterial in the case at bar. While it might be material upon a question of jurisdiction of the Courts of the United States, it would not be material upon the question of the protection of the fifth amendment to the constitution. In other words, a citizen of the United States has the protection of the fifth amendment without regard to his state citizenship. In the case of *United States* v. *Celestine*, *supra*, this Court also noted the purpose of Congress as expressed in the Act of May 8, 1906, (34 Stat. 102), extending the trust period of allottees under the Act of 1887. The Indians in the Indian Territory were specifically exempted from the provisions of said Act.

We, therefore, respectfully insist that—if the restrictions against alienation of inherited lands by full-

bloods are extended beyond the period fixed in the treaty, that is, beyond August 8, 1907,—the act is unconstitutional and void.

Respectfully submitted,

GEO. S. RAMSEY,
S. T. BLEDSOE,
Counsel for Defendants in Error.

APPENDIX A.

From Congressional Record, Vol. 33, Part 8, page 6760, under date of June 5, 1900. Title, "Indian Allotments":

Mr. Speaker: Does the gentleman from Wisconsin object to the calling up of the bill by the gentleman from Kansas?

Mr. Cooper: No, Mr. Speaker, I withdraw that objection.

Mr. Curtis: Mr. Speaker, I ask the unanimous consent for the present consideration of the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, numbered 24.

The clerk read the bill, as follows:

> "Be it enacted, etc., that section six of chapter one hundred nineteen of the United States Statutes at large, numbered 24, page three hundred and ninety, is hereby amended, as follows, to-wit: 'After the words "civilized life" in line thirteen of said section six, insert the words, "and every Indian in the Indian Territory".'"

Speaker: Is there objection?

Mr. Steele: I ask for an explanation.

Mr. Curtis: Under the Act of 1896 allotments are made to an Indian who becomes a citizen of the United States.

Mr. Lentz: Mr. Speaker, I ask for order, as I want to hear this explanation myself.

Speaker: The House will be in order and gentlemen will take their seats and cease conversation.

Mr. Curtis: Mr. Speaker, the Act of 1887, known as the Dawes Allotment Act, provided that when allotments are made to Indians they shall become citizens of the United States. The statute, however, was not

made applicable to the members of the Five Civilized Tribes in the Indian Territory, because they had governments of their own, elected officers and owned their own property in common. But since that time agreements have been made with the said Five Tribes. Their tribal governments are to be broken up; provisions have been made for them to take their lands in severalty. The allotments are being made, or will soon be made; they have been given the right to vote in certain elections; they serve on juries; they have the right to bring law suits, etc. The Committee thought it proper, therefore, to extend over the members of the Five Civilized Tribes the provisions of the Act of 1887.

Mr. Snodgrass: Does that make them citizens?

Mr. Curtis: It does.

Mr. Snodgrass: Under the existing treaties between the United States and those Five Tribes, have we the right to abolish their tribal government?

Mr. Curtis: They have agreed to it. Agreements with them have been negotiated through the Dawes Commission, and three of those agreements have been ratified by Congress, and the remaining two agreements passed the House a day or two ago.

Mr. Snodgrass: Already?

Mr. Curtis: Already; and allotments will soon be made to the members of some of the tribes. Work preparatory to allotment is now going on.

There being no objection, the House proceeded to the consideration of the bill; which was ordered to be engrossed, and was accordingly read the third time and passed.

On motion of Mr. Curtis, motion to reconsider the last vote was laid on the table.

For a discussion of the reasons for the extension of tribal government, see Congressional Record, date of February 28, 1906, Vol. 40, Part 4, page 3120.

Attention is called to the following discussion between Senators McCumber and Long, touching the provisions of the Act of April 26, 1906, extending tribal existence:

Mr. Long: There are provisions in the bill now pending for the continuance of tribal relations, for making a definite and complete roll of each tribe, which shall govern in the distribution of tribal property.

Mr. McCumber: Yes, but that would not continue the government; that is simply continuing the persons who before had something to do with the government in certain positions for the purpose of carrying out some new provision. It is creating a certain office, if I may say, that is purely a Federal office, and for the purpose of signing papers.

Mr. Long: The Senator has reference to the government.

Mr. Bailey: If the Senator will permit me, the whole purpose of that is to insure the proper distribution of the property.

Mr. McCumber: Nothing more.

Mr. Bailey: That is all. The tribal relations there are practically destroyed to-day. The Indians are on their separate allotments, to which they either already have a deed, or to which they are now entitled to receive a deed. They have no longer any tribal court; they still have a tribal government, but after the 4th day of March they resort to the courts of the United States to assert their rights or to protect their rights. Therefore, there is nothing but what the Senator from

Kansas (Mr. Long) himself described yesterday as a shell of a government there.

Mr. Long: That is all.

Mr. Bailey: Now, I want to state to the Senator the purpose I have in this, and I make no concealment of it. I am trying to prevent the railroad from obtaining that land.

Mr. McCumber: I think we all agree with the Senator on that.

After concluding the discussion of a possibility of the railroad grant attaching, in the House, on consideration of this resolution, Congressional Record, Vol. 40, page 3222, Mr. Curtis concludes as follows:

> "While, in my judgment, this legislation is not at all necessary, because I do not believe that the grant to the railroad attaches, or can attach, yet, in view of the fact that the question has been raised by able lawyers at the other end of the Capitol, I think it safe to pass this resolution."

APPENDIX B.

The act of May 8, 1906, passed the House of Representatives on March 9, 1906. As reported by the Committee, the bill did not have the proviso, "Provided, further, that until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." (Congressional Record, Vol. 40, Part 4, page 3598.)

After a discussion of the various provisions of the bill, Mr. Curtis states: "So far as the Indian Territory is concerned, all the Indians have been made citizens of the United States, and they are citizens now. The allotments have all been made to the Seminoles; nearly all to the Creeks. They are being made to the Chickasaws, the Choctaws and Cherokees."

Mr. Finley: How many Indians in the Indian Territory have received their allotments?

Mr. Curtis: That would be very hard to say. There are about 4,000 allotments yet to be made to the Choctaws and Chickasaws, but the patents have not been delivered to those who have been allotted in those two tribes. Nearly 7,000 patents have been delivered to the members of the Cherokee tribe; nearly all patents have been delivered to members of the Creek tribe, and allotmnts are complete among the Seminole tribe.

Mr. Finley: Would not the passage of this bill have the effect of delaying it?

Mr. Curtis: It would not have that effect in the Indian Territory, because they were not included in the Act of 1887; and the Government has made special

agreements with the Five Tribes in the Indian Territory and this law would in no way affect them.

Mr. Finley: I understood the gentleman from South Dakota to say a moment ago it would apply to the Indians in the Indian Territory.

Mr. Burke, of South Dakota: I stated I did not know, and I yielded to the gentleman from Kansas, who did.

Mr. Curtis: The law never applied to the Indian Territory.

Mr. Finley: Then, I understand, it does not apply to the Indians in the Indian Territory.

Mr. Burke: It seems not.

Mr. Keifer: I wish to ask the gentleman a question or two.

Mr. Burke: I yield to the gentleman.

Mr. Keifer: I want to know what there is in the bill that he has prepared that excludes it from general operation upon the Indian tribes in the Indian Territory.

Mr. Burke: The gentleman from Kansas has just explained, I thought, that particular point.

Mr. Keifer: A general law is likely to apply generally. Is there any reservation in this bill?

Mr. Curtis: Not in this bill; this is simply an amendment of Section 6, of the Act of 1887. The Act of 1887 excludes the Indians of the Indian Territory. Now, there is nothing in this bill bringing them within its terms. Therefore, the two Acts would be construed together, and under the rules of law, it would be held that the original Act not applying to the Indians in the Indian Territory, this Act amending it would not apply to them. Now, we have special agreements with the Five Tribes, under which allotments are being made to them. We have a bill pending, which will go to con-

ference within a day or two, providing for final settlement of all of their affairs. We have special provisions in the various agreements in regard to the sale of intoxicating liquors, which have not been put in other agreements with Indians in the United States, and they have always been dealt with separtely and distinctly. The agreements provide the conditions under which the patents shall be issued, which shall be subject to alienation and when they may be alienated; that homesteads shall not be disposed of for certain periods. As this bill only affects Indians with whom agreements are hereafter to be made, it cannot under any circumstances apply to the members of the Five Civilized Tribes.

. . . . . .

Mr. Burke, of South Dakota: Let me state to the gentleman from Ohio that we have this proviso on the bill: "Provided, further, that after issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States." Now, we certainly cannot legislate to change the status of any citizen whose status has been fixed, and the Supreme Court, in the *Heff* case, state that we have not that right without the consent of the citizen to be affected, and the consent of the State within which he resides.

Mr. Keifer: I have no objection to that statement, but it does not cover the objection; it applies only to conditions already fixed; but there are cases that are to come, of applications to be made, allotments to be made in the future, and this may embarrass conditions existing in the Indian Territory; and no matter whether there is a reservation in the Act of 1887 or not, there is no reservation in this, and that is what I suggest—that the gentleman put in such a reservation. I am not opposing the bill.

Mr. Curtis: Very few words would cover it, simply

providing that the provisions of this Act should not extend to the Indians in the Indian Territory.

Mr. Keifer: I suggest that it had better be put so as to avoid any confusion.

. . . . . .

Mr. Curtis: Mr. Speaker, I suggest the following amendment: "Provided, further, that the provisions of this Act shall not extend to the Five Civilized Tribes."

Mr. Lacey: In the Indian Territory?

Mr. Curtis: In the Indian Territory.

. . . . . .

Mr. Steenerson: I understand the object of this bill is to apply to those Indians who hereafter, after the passage of the proposed Act, shall be allotted lands in severalty.

. . . . . .

Mr. Keifer: Mr. Speaker, the amendment offered by the gentleman from Kansas (Mr. Curtis), I think, has not been reported.

Mr. Speaker: The clerk will report the amendment.

The clerk wrote as follows:

"Add on the end of the bill the following:

"'And provided, further, that the provisions of this Act shall not extend to the Five Civilized Tribes'."

EXHIBIT C.

Constitution of the Creek Nation.

In order to form a perfect union, establish justice, and secure to ourselves, and our children, the blessings of freedom, We, the people of the Muskogee Nation, do adopt the following Constitution:

Article I

Section 1. The lawmaking power of this Nation shall be lodged in a Council, which shall consist of two Houses, the House of Kings, and the House of Warriors.

Sec. 2. The House of Kings shall be composed of one representative from each town. Each member shall be elected by the vote of the town which he represents, and shall hold his office for four years.

Sec. 3. The House of Warriors shall consist of one representative from each town, and an additional representative for every two hundred persons belonging to the town. Each member shall be elected by the vote of the town which he represents, and shall hold his office for four years.

Sec. 4. The members of the Council shall receive such compensation out of the National Treasury as shall be provided for by law.

Sec. 5. A majority of the members of each House shall constitute a quorum, but a less number may adjourn from day to day and compel the presence of absentees.

Sec. 6. Each House shall judge of the returns and qualifications of its members, impeach a member for disorderly conduct, and, by the concurrence of the two-

thirds of both Houses, expel a member. Neither House shall adjourn for a longer period than two days without the consent of both houses.

Sec. 7. The House of Kings shall elect its own President, and the House of Warriors shall elect its own Speaker.

Sec. 8. Each House shall choose its own Secretary, whose pay shall be provided by law, and whose term of office shall continue at the discretion of the House which he serves.

Sec. 9. No person shall become a member of either House, who shall not be an acknowledged citizen, and who shall not have attained the age of twenty-two years.

Sec. 10. The style of the action of the Council shall be: "Be It Enacted by the National Council of the Muskogee Nation."

Article II.

Section 1. There shall be a Principal Chief, to be styled the "Principal Chief of the Muskogee Nation," who shall be elected for the term of four years, by a majority of the votes of the male citizens of the Muskogee Nation, who shall have attained the age of eighteen years. There shall also be a Second Chief, who shall be chosen for the same term, in the same manner as that prescribed for the election of the Principal Chief, and in case of the death, resignation or removal from office of the Principal Chief, he shall perform all the duties of that officer.

Sec. 2. No person shall be eligible to the office of Principal Chief or Second Chief of the Muskogee Nation, who is not a recognized citizen of the same, and who shall not have attained the age of thirty years.

Sec. 3. The Principal Chief is hereby invested with the reprieving and pardoning power. He shall see

that all the laws of this Nation are faithfully executed and enforced; shall make an annual report to the National Council of the condition of affairs in the Nation; and shall recommend such measures as he may deem necessary for the welfare of the Nation.

Sec. 4. Whenever any bill or measure shall pass both Houses, it shall be submitted to the Principal Chief for his approval or rejection. If he shall approve it, it shall become a law. If he shall object to it, he shall, within five days, return it, accompanied by his objections, to the House in which it originated; and if not so returned within five (5) days, it shall become a law. If, after a bill or measure has been vetoed by the Principal Chief, it shall again be submitted to both Houses, and receive a favorable vote of two-thirds of both Houses, it shall become a law.

Sec. 5. Whenever any bill or measure shall pass both Houses and be submitted to the Principal Chief for his approval or rejection, within five days before an adjournment, he shall be allowed the first three days of the next Council within which to return the same.

Sec. 6. The Principal Chief shall be allowed to select a private secretary, who shall be compensated out of the National Treasury, as provided by law.

Article III.

Section 1. The supreme law defining power in this Nation shall be lodged in a High Court, to be composed of five (5) competent recognized citizens of the Muskogee Nation, who shall have attained the age of twenty-five (25) years. They shall be chosen by the National Council for the term of four years, and shall be paid as provided for by law.

Sec. 2. This Court shall meet on the first Monday in October in each year, and shall have power to try all

cases, where the issue is for more than one hundred dollars ($100). Three members shall constitute a quorum.

Article IV.

Section 1. The Muskogee Nation shall be divided into six (6) districts, and each district shall be furnished with a Judge, a Prosecuting Attorney and a company of Light Horsemen.

Sec. 2. The Judge shall be chosen by the National Council for the term of two years. He shall try all cases, civil and criminal, where the issue does not exceed one hundred dollars. He shall have the right to summon twenty-four disinterested men, out of which number there shall be selected, in criminal cases twelve, and in civil cases nine, who shall sit as jurors. He shall also be allowed a clerk, whose pay shall be provided for by law. The Judge's pay shall be provided for by law.

Sec. 3. Any person failing to obey a summons to serve as juror, without good reason for such failure, shall be fined the sum of five dollars ($5). Each juror whilst in service shall receive one dollar per day.

Sec. 4. The prosecuting attorney shall be appointed by the Principal Chief, by and with the consent of the National Council. It shall be his duty to indict and prosecute all offenders against the laws in his district. For each conviction he shall be paid the sum of twenty-five dollars ($25).

Sec. 5. The light horse company shall consist of a captain and four privates, who shall be elected for the term of two years by the vote of the district, and shall be subservient to the orders of the Judge. Their compensation shall be provided for by law.

Article V.

Section 1. There shall be a National Treasurer, who shall be selected by the National Council for the

term of four years. His duty shall be to receive and receipt for all National funds and to disburse the same as shall be provided for by law. He shall report the condition of the National finances to the National Council at least once every year. He shall be required to bind himself in a bond of five thousand dollars ($5,000), with good security, for the faithful performance of his duty. He shall be paid as provided for by law.

Sec. 2. No moneys shall be drawn from the Nation Treasury, except to carry out appropriations made by the National Council, and when such an appropriation is so made, the Principal Chief shall issue a draft upon the treasury to meet the same.

Article VI.

Section 1. There shall be a National interpreter, who shall be elected by the National Council for the term of four years, and who shall be compensated according to provisions of law.

Article VII.

Section 1. All officers of this Government shall be liable to impeachment, trial and removal from office for neglect of duty.

Sec. 2. All bills of impeachment shall originate in the House of Warriors.

Article VIII.

Section 1. No laws impairing contracts shall be passed.

Sec. 2. No laws taking effect upon things that occurred before the enactment of the law shall be passed.

Article IX.

Section 1. All cases shall be tried according to the provisions of the respective laws under which they originated.

Sec. 2. All persons shall be allowed the right of counsel.

Article X.

Section 1. All treaties shall be made by delegates, duly recommended by the Principal Chief, and approved by the National Council; and such treaties shall be subject to the ratification of the National Council.

Sec. 2. The treaties shall be the supreme law of the land.

(*Note*—This Constitution will be found in the printed and compiled laws of the Creek Nation, published in 1880, by Perryman, the Chief.)

EXHIBIT D.

Constitution of the Cherokee Nation.

The Eastern and Western Cherokees having again reunited, and become one body politic, under the style and title of the CHEROKEE NATION;

Therefore, We, the people of the Cherokee Nation, in National Convention assembled, in order to establish justice, insure tranquility, promote the common welfare, and to secure to ourselves and our posterity the blessings of freedom—acknowledging with humility and gratitude the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring His aid and guidance in its accomplishment—do ordain and establish this Constitution for the government of the Cherokee Nation.

Article I.

Section 1. The boundary of the Cherokee Nation shall be that described in the Treaty of 1833, between the United States and Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States.

Sec. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them; provided, that the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this Article,

shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease; provided, nevertheless, that the National Council shall have the power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such re-admission.

Moreover, The National Council shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements, with the view of speculation.

Article II.

Section 1. The power of this government shall be divided into three distinct departments—the Legislative, the Executive, and the Judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases hereinafter expressly directed or permitted.

Article III.

Section 1. The Legislative power shall be vested in two distinct branches—a National Committee and Council, and the style of their acts shall be: "Be it enacted by the National Council."

Sec. 2. The National Council shall make provision, by law, for laying off the Cherokee Nation into eight districts, and, if subsequently it should be deemed expedient, one or two may be added thereto.

Sec. 3. The National Committee shall consist of

two members from each district, and the Council shall consist of three members from each district, to be chosen by the qualified electors in their respective districts for two years; the elections to be held in the respective districts every two years, at such times and places as may be directed by law.

The National Council shall, after the present year, be held annually, to be convened on the first Monday in October, at such place as may be designated by the National Council, or, in case of emergency, by the Principal Chief.

Sec. 4. Before the districts shall be laid off, any election which may take place, shall be by general vote of the electors throughout the Nation for all officers to be elected.

The first election for all the officers of the government—Chiefs, Executive Council, members of the National Council, Judges and Sheriffs—shall be held at Tahlequah, before the rising of this Convention; and the term of services of all officers elected previous to the first Monday in October, 1839, shall be extended to embrace, in addition to the regular constitutional term, the time intervening from their election to the first Monday in October, 1839.

Sec. 5. No person shall be eligible to a seat in the National Council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

Sec. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and at the National Council, in going to and returning.

Sec. 7. In all elections by the people, the electors shall vote *viva voce*.

All free male citizens, who shall have attained to the age of eighteen years, shall be equally entitled to vote at all public elections.

Sec. 8. Each branch of the National Council shall judge the qualifications and returns of its own members, and determine the rules of its proceedings, punish a member for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offense.

Sec. 9. Each branch of the National Council, when assembled, shall choose its own officers, a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalty as each branch may prescribe.

Sec. 10. The members of the National Committee shall each receive from the public treasury a compensation for their services, which shall be three dollars per day during their attendance at the National Council; and the members of the Council shall each receive three dollars per day for their services during their attendance at the National Council; provided, that the same may be increased or diminished by law; but no alteration shall take effect during the period of service of the members of the National Council by whom such alteration may have been made.

Sec. 11. The National Council shall regulate by law, by whom and in what manner writs of election

shall be issued to fill the vacancies which may happen in either branch thereof.

Sec. 12. Each member of the National Council, before he takes his seat, shall take the following oath of affirmation:

> "I, A. B., do solemnly swear (or affirm, as the case may be), that I have not obtained my election by bribery, threats, or any undue or unlawful means, used by myself or others, by my desire and approbation for that purpose; that I consider myself constitutionally qualified as a member of ——, and that on all questions and measures which may come before me, I will so give my vote, and so conduct myself, as in my judgment shall appear most conducive to the interest and prosperity of this Nation, and that I will bear true faith and allegiance to the same, and to the utmost of my ability and power, observe, conform to, support and defend the Constitution thereof."

Sec. 13. No person who may be convicted of felony shall be eligible to any office or appointment of honor, profit, or trust, within this Nation.

Sec. 14. The National Council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the Nation, which shall not be contrary to this Constitution.

Sec. 15. It shall be the duty of the National Council to pass such laws as may be necessary and proper to decide differences by arbitration, to be appointed by the parties who may choose that summary mode of adjustment.

Sec. 16. No power of suspending the laws of this Nation shall be exercised, unless by the National Council or its authority.

Sec. 17. No retrospective law, nor any law impairing the obligation of contracts, shall be passed.

Sec. 18. The National Council shall have power to make laws for laying and collecting taxes for the purpose of raising a revenue.

Sec. 19. All bills making appropriations shall originate in the National Committee, but the Council may propose amendments or reject the same. All other bills may originate in either branch, subject to the concurrence or rejection of the other.

Sec. 20. All acknowledged treaties shall be the supreme power of the land, and the National Council shall have the sole power of deciding on the construction of all treaty stipulations.

Sec. 21. The Council shall have the sole power of impeaching. All impeachments shall be tried by the National Committee. When sitting for that purpose, the member shall be upon oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the members present.

Sec. 22. The Principal Chief, Assistant Principal Chief, and all civil officers, shall be liable to impeachment for misdemeanor in office, but judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust, or profit under the government of this Nation.

The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law.

Article IV.

Section 1. The supreme executive power of this Nation shall be vested in a Principal Chief, who shall be styled "The Principal Chief of the Cherokee Nation."

The Principal Chief shall hold his office for the term of four years, and shall be elected by the qualified electors on the same day at the places where they

shall respectively vote for members to the National Council.

The returns of the election for Principal Chief shall be sealed up and directed to the President of the National Committee, who shall open and publish them in the presence of the National Council assembled. The person having the highest number of votes shall be Principal Chief, but if two or more shall be equal and highest in votes, one of them shall be chosen by joint vote of both branches of the Council. The manner of determining contested elections shall be directed by law.

Sec. 2. No person, except a natural born citizen, shall be eligible to the office of Principal Chief; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years.

Sec. 3. There shall also be chosen at the same time by the qualified electors in the same manner for four years, an Assistant Principal Chief, who shall have attained to the age of thirty-five years.

Sec. 4. In case of the removal of the Principal Chief from office, or of his death or resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Assistant Principal Chief, until the disability be removed, or the vacancy filled by the National Council.

Sec. 5. The National Council may, by law, provide for the case of removal, death, resignation, or disability of both the Principal and Assistant Principal Chiefs, declaring what officer shall then act as Principal Chief until the disability be removed, or a Principal Chief shall be elected.

Sec. 6. The Principal and Assistant Principal Chiefs shall, at stated times, receive for their services a compensation which shall neither be increased or diminished during the period for which they shall have been elected, and they shall not receive within that per-

iod, any other emolument from the Cherokee Nation or any other government.

Sec. 7. Before the Principal Chief enters on the execution of his office, he shall take the following oath or affirmation:

> "I do solemnly swear or affirm that I will faithfully execute the duties of Principal Chief of the Cherokee Nation, and will, to the best of my ability, preserve, protect, and defend the Constitution of the Cherokee Nation."

Sec. 8. He may, on extraordinary occasions, convene the National Council at the seat of government.

Sec. 9. He shall, from to time, give to the National Council information of the state of government, and recommend to their consideration such measures as he may deem expedient.

Sec. 10. He shall take care that the laws be faithfully executed.

Sec. 11. It shall be his duty to visit the different districts at least once in two years, to inform himself of the general conditions of the country.

Sec. 12. The Assistant Principal Chief shall, by virtue of his office, aid and advise the Principal Chief in the administration of the government at all times during his continuance in office.

Sec. 13. Vacancies that may occur in offices, the appointment of which is vested in the National Council, shall be filled by the Principal Chief during the recess of the National Council by granting commissions which shall expire at the end of the next session thereof.

Sec. 14. Every bill which shall pass both branches of the National Council shall, before it becomes a law, be presented to the Principal Chief; if he approves, he shall sign it; but if not, he shall return it, with his objections, to that branch in which it may have origi

nated, who shall enter the objections at large on their journals and proceed to reconsider it; if, after such reconsideration, two-thirds of that branch shall agree to pass the bill, it shall be sent, together with the objections, to the other branch, by which it shall likewise be reconsidered, and, if, approved by two-thirds of that branch, it shall become a law. If any bill shall not be returned by the Principal Chief within five days (Sundays excepted), after the same has been presented to him, it shall become a law in like manner as if he had signed it, unless the National Council, by their adjournment, prevent its return, in which case it shall be a law, unless sent back within three days after their next meeting.

Sec. 15. Members of the National Council, and all officers, executive and judicial, shall be bound by oath to support the Constitution of this Nation, and to perform the duties of their respective offices with fidelity.

Sec. 16. In case of disagreement between the two branches of the National Council with respect to the time of adjournment, the Principal Chief shall have power to adjourn the same to such time as he may deem proper; provided, it be not a period beyond the next constitutional meeting thereof.

Sec. 17. The Principal Chief shall, during the session of the National Council, attend at the seat of government.

Sec. 18. There shall be a council composed of five persons, to be appointed by the National Council, whom the Principal Chief shall have full power at his discretion to assemble; he, together with the Assistant Principal Chief and the counselors, or a majority of them, may, from time to time, hold and keep a council for ordering and directing the affairs of the Nation according to law; provided, the National Council shall have power to reduce the number, if deemed expedient.

after the first term of service, to a number not less than three.

Sec. 19. The members of the executive council shall be chosen for the term of two years.

Sec. 20. The resolutions and advice of the council shall be recorded in a register, and signed by the members agreeing thereto, which may be called for by either branch of the National Council; and any counselor may enter his dissent to the majority.

Sec. 21. The Treasurer of the Cherokee Nation shall be chosen by a joint vote of both branches of the National Council for the term of four years.

Sec. 22. The Treasurer shall, before entering on the duties of his office, give bond to the Nation, with sureties, to the satisfaction of the National Council, for the faithful discharge of his trust.

"Sec. 23. No money shall be drawn from the Treasury but by warrant from the Principal Chief, and in consequence of appropriations made by law.

Sec. 24. It shall be the duty of the Treasurer to receive all public moneys, and to make a regular statement and account of the receipts and expenditures of all public moneys at the annual session of the National Council.

Article V.

Section 1. The judicial powers shall be vested in a Supreme Court, and such circuit and inferior courts as the National Council may, from time to time, ordain and establish.

Sec. 2. The Judges of the Supreme and Circuit Courts shall hold their commissions for the term of four years, but any of them may be removed from office on the address of two-thirds of each branch of the National Council to the Principal Chief for that purpose.

Sec. 3. The Judges of the Supreme and Circuit

Courts shall, at stated times, receive a compensation which shall not be diminished during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the government of this Nation, or any other power.

Sec. 4. No person shall be appointed a judge of any of the courts until he shall have attained the age of thirty years.

Sec. 5. The Judges of the Supreme and Circuit Courts shall be elected by the National Council, and there shall be appointed in each district as many Justices of the Peace as it may be deemed expedient for the public good, whose powers, duties, and duration in office shall be clearly designated by law.

Sec. 6. The Judges of the Supreme Court and of the Circuit Courts shall have complete criminal jurisdiction in such cases, and in such manner as may be pointed out by law.

Sec. 7. No Judge shall sit on trial of any cause when the parties are connected (with him) by affinity or consanguinity, except by consent of the parties. In case all the Judges of the Supreme Court shall be interested in the issue of any cause, or related to all or either of the parties, the National Council may provide by law for the selection of a suitable number of persons of good character and knowledge, for the determination thereof, and who shall be specially commissioned for the adjudication of such case by the Principal Chief.

Sec. 8. All writs and other process shall run "In the Name of the Cherokee Nation," and bear test and be signed by the respective clerks.

Sec. 9. Indictments shall conclude "Against the Peace and Dignity of the Cherokee Nation."

Sec. 10. The Supreme Court shall, after the present year, hold its session annually at the seat of gov-

ernment, to be convened on the first Monday of October in each year.

Sec. 11. In all criminal prosecutions the accused shall have the right of being heard; of demanding the nature and cause of the accusation; of meeting the witnesses face to face; of having compulsory process for obtaining witnesses in his or their favor; and in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage; nor shall the accused be compelled to give evidence against himself.

Sec. 12. The people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue, without describing them as nearly as may be, nor without good cause, supported by oath or affirmation.

Sec. 13. All persons shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or presumption great.

Article VI.

Section 1. No person who denies the being of a God or future state of reward and punishment, shall hold any office in the civil department in this Nation.

Sec. 2. The free exercise of religious worship, and serving God without distinction, shall forever be enjoyed within the limits of this Nation; provided, that this liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this Nation.

Sec. 3. When the National Council shall determine the expediency of appointing delegates, or other public agents, for the purpose of transacting business with the government of the United States, the Principal Chief shall recommend, and, by the advice and consent

of the National Committee, appoint and commission such delegates or public agents accordingly. On all matters of interest, touching the rights of the citizens of this Nation, which may require the attention of the United States government, the Principal Chief shall keep up a friendly correspondence with that government through the medium of its proper officers.

Sec. 4. All commissions shall be "In the Name and by the Authority of the Cherokee Nation," and be sealed with the seal of the Nation, and signed by the Principal Chief. The Principal Chief shall make use of his private seal until a National seal shall be provided.

Sec. 5. A sheriff shall be elected in each district by the qualified electors thereof, who shall hold his office two years, unless sooner removed. Should a vacancy occur subsequent to an election, it shall be filled by the Principal Chief, as in other cases, and the person so appointed shall continue in office until the next regular election.

Sec. 6. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall the property of any person be taken and applied to public use without a just and fair compensation; provided, that nothing in this clause shall be so construed as to impair the right and power of the National Council to lay and collect taxes.

Sec. 7. The right of trial by jury shall remain inviolate, and every person, for injury sustained in person, property, or reputation shall have remedy by due course of law.

Sec. 8. The appointment of all officers, not otherwise directed by this Constitution, shall be vested in the National Council.

Sec. 9. Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the

means of education shall forever be encouraged in this Nation.

Sec. 10. The National Council may propose such amendments to this Constitution as two-thirds of each branch may deem expedient, and the Principal Chief shall issue a proclamation to promulgate the same as extensively as possible within their respective districts at least six months previous to the next general election. And if, at the first session of the National Council, after such general election, two-thirds of each branch shall, by ayes and noes, ratify such proposed amendments, they shall be valid to all intents and purposes, as parts of this Constitution; provided, that such proposed amendments shall be read on three several days in each branch, as well as when the same are proposed, as when they are ratified.

Done in convention at Tahlequah, Cherokee Nation, this sixth day of September, 1839.

GEORGE LOWREY,
President of the National Convention.

EXHIBIT E.

The Department of the Interior is always jealous of its authority over the Indian tribes and Indian affairs. That authority is not relinquished except when the department is convinced beyond controversy that it cannot be lawfully asserted. The opinion of the department, therefore, in construing section 22 above quoted against its own authority is the strongest evidence of the fact that such provision would not bear any other construction. The opinion of the Assistant Attorney General as approved by the Secretary is in full as follows:

DEPARTMENT OF THE INTERIOR.

Office of Assistant Attorney General.

Washington.

January 29, 1907.

21788-1906.
Int. Ter. Div.

The Secretary of the Interior.

Sir: You have submitted the papers relating to the approval of the deed executed under the direction of the United States Court by the curator of the estate of Willis and Richardson Watson, minor, full-blood Choctaw Indians, covering one hundred and twenty acres of land originally allotted to their father, Robinson Watson, saying:

"In view of sections 19, 20 and 22 of the Act

of Congress approved April 26th, 1906, (34 Stat. 137), your opinion is requested in the matter."

The land in question being the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, the northeast quarter of the northwest quarter of the southwest quarter, the north half of the northeast quarter of the southwest quarter and the northwest quarter of the northwest quarter of the southwest quarter, section 25, T. 5 S., R. 1 E., in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead. May 28th, 1903, and homestead patent executed in his favor was filed for record in the office of the Commission to the Five Civilized Tribes Sept. 18, 1905.

It is alleged in the petition for the sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the lands belonging to the estate of their deceased father, Robinson Watson, March 31st, 1906, after due notice thereof, C. D. Wortham, as curator filed in the United States Court for the Southern District of the Indian Territory, application to sell said real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12th, 1906, and appraisers were appointed to view and appraise the property. They appraised it for $1,200.00 and the property was sold May 12th, for $1,100.

This sale was subsequently approved by the court and deed executed thereon May 14th, 1906. In view of the provisions of section 22 of the Act of April 26th, 1906, the department has been asked to give its approval to this sale.

In the Act of June 28th, 1898, (30 Stat. 495, Sec. 29.), it was provided that each allottee of the Choctaw and Chickasaw Tribes of Indians should select from his allotment a homestead of 160 acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the Act of July 1, 1902, (32 Stat. 641), it is provided that each member of said tribes shall at the time of selecting his allotment designate as homestead land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nation 'which shall be inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment, and separate certificate and patent shall issue for said homestead.'

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restrictions upon alienation.

The Act of April 28th, 1904, (32 Stat. 573), contains the following provision:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedmen or otherwise."

These minors and their lands, held by them free from any restrictions upon alienation, were within the jurisdiction of the United States Court as

described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to sections 19, 20 and 22 of the Act approved April 26th, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to expiration of said period, be removed by acts of Congress." This provision related to allottees and has no bearing on the question here presented. Section 20 refers exclusively to leases and rental contracts and does not effect this case. Section 22 reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the land of the tribe to which he or she belongs, or belonged, may sell and convey the lands inherited from such decedent; and if there be both, adult and minor heirs of such decedent, then, such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court of the Indian Territory. And in case of the organization of a state or territory, then by the proper court of the county in which said minor, or minors, may reside, or in which said real estate is situated, upon an order of such court made upon application filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval by the Secretary of the Interior, under such rules and regulations as he may prescribe."

This section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It cannot, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the Act of July 1, 1902, *supra*, is that they may be alienated one-fourth in acreage in one year; one-fourth in three years, and the balance in five years from the date of patent. There is no permissable construction of said section 22, except that it applies so far as the Choctaws and Chickasaws are concerned to these surplus lands which descend to the heirs burdened with the restrictions upon alienation and not to the homestead which descend to the heirs freed of all such restrictions.

If this is the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are returned herewith.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved:
January 29th, 1907.
E. A. HITCHCOCK, Secretary.

EXHIBIT F.

Patent to the Creek Nation.

"The United States of America. To all Who Shall See These Presents, Greeting

"Whereas, A treaty was made and concluded on the fourteenth day of February, in the year of Our Lord, Eighteen Hundred and Thirty-three, in words following, to-wit:

'Art. 2d. The United States hereby agree with the consent of the Creek and Cherokee delegates, this day obtained, that the Muskogee or Creek Country West of the Mississippi shall be embraced within the following boundaries, viz: Beginning at the Mouth of the North Fork of the Canadian River and run Northerly four miles, thence running a straight line so as to meet a line drawn from the South Bank of the Arkansas River opposite to the East Lower Bank of Grand River at its junction with the Arkansas River, and which runs a course South 44 degrees, West one mile, to a post placed in the ground, thence along said line to the Arkansas, and up the same and the Virdigris River to where the old Territorial Line crosses it, thence along said line North to a point twenty-five miles from the Arkansas River where the Old Territorial line crosses the same; thence running at right angles with the Territorial line aforesaid, or west, to the Mexico line; thence along the said line Southerly to the Canadian River; or to the boundary of the

Choctaw Country; thence down said River to the place of beginning.

'The lines hereby defining the Country of the Muskogee Indians on the North and East, bound the country of the Cherokee along these courses as settled by the treaty concluded this day between the United States and that Tribe.

"Art. 3d. The United States will grant a Patent in fee simple to the Creek Nation for the land assigned said Nation by this Treaty or Convention, whenever the same shall have been ratified by the President and Senate of the United States; and the right thus granted by the United States shall be continued to said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the Country hereby assigned them.

'Art. 4th. It is hereby mutually understood and agreed between the parties to this Treaty that the land assigned to the Muskogee Indians by the Second Article thereof, shall be taken and considered as the property of the whole Muskogee or Creek Nation, as well as those now residing upon the land as of the great body of said Nation who still remain on the East side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this Country is provided by their Treaty with the United States, dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the Country of the Creek Nation; and they, the Seminoles, will hereafter be considered a constituent part of said Nation, but are to be located on some part of the Creek Country by themselves; which location will be selected for them by the Commissioners who have signed these Articles of Agreement or Convention.

'Now, Know Ye, that the United States of

America, in consideration of the premises and in conformity with the above recited provisions of the Treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians the Tract of Country above described. To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the Country hereby assigned to them.

In testimony whereof, I, Millard Fillmore, President of the United States of America, have caused these letters to be made patent and the Seal of the Department of the Interior to be hereto affixed.

Given under my hand at the City of Washington, the eleventh day of August, in the Year of Our Lord One Thousand Eight Hundred and Fifty two, and of the Independence of the United States the Seventy-seventh.

MILLARD FILLMORE.

By the President.

ALEXANDER H. H. STUART,
Secretary Department of the Interior.

PHILLIP H. RAIFORD,
United States Agent for the Creek Indians."

Office Supreme Court, U. S.
FILED.
MAR 1 1911
JAMES H. McKENNEY,
CLERK.

No. 60.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

MARCHIE TIGER, PLAINTIFF IN ERROR,

v.

THE WESTERN INVESTMENT COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF THE UNITED STATES ON THE REARGUMENT.

In the Court of Claims of the United States.

OCTOBER TERM, 1910.

MARCHIE TIGER, PLAINTIFF IN ERROR,
v.
THE WESTERN INVESTMENT COMPANY ET AL. } No. 60.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR THE UNITED STATES ON THE REARGUMENT.

STATEMENT.

The United States by leave of court was heard on brief and oral argument upon the original submission of this case in December, 1910.

The case having been now restored to the docket and assigned for reargument, the United States again asks to be heard for the same reason previously suggested, to wit, that the interests of all Indians of the Five Civilized Tribes, whose welfare the Government is bound to guard, are here involved, and for the additional reason that since the previous submission of this case several other cases, particularly *Mullen et al.* v. *United States,* No. 712, and *Goat et al.* v. *United*

States, No. 713, of the present term, in which cases the Government is directly interested, are now docketed in this court, and involve substantially the same questions as those presented by the case at bar.

Marchie Tiger, plaintiff in error in the present case, is a full-blood Creek Indian. He inherited lands which had been allotted to full-blood relatives of that tribe. (Rec., 18, 31, 32.) All the lands inherited by him were allotted under the act of Congress of June 30, 1902, which expressly provided that such lands should not be alienated, either by the original allottee or his heirs, for five years, except with the approval of the Secretary of the Interior. The five-year limitation would have expired on August 8, 1907.

In the meantime, however, on April 26, 1906, Congress passed an act prohibiting the alienation thereafter of any allotted lands inherited by full-blood Indians of the Five Civilized Tribes without the approval of the Secretary of the Interior.

On August 8, 1907, the very day when the original five-year limitation would have expired, and on several dates subsequent thereto, Marchie Tiger undertook to convey to the defendants in error allotted lands inherited by him and to make such conveyances without the approval of the Secretary of the Interior and without complying with the rules and regulations prescribed by law for the sale of inherited lands by full-blood Indians of the Five Civilized Tribes.

Subsequently, the plaintiff in error brought suit in the United States District Court for the Western District of Indian Territory, to set aside these attempted conveyances as a cloud upon his title, on the ground that the same were invalid under said act of April 26, 1906. The District Court found for the plaintiff in error and made a decree for the cancellation of the attempted conveyances.

Upon appeal, the Supreme Court of Oklahoma reversed the decree of the District Court solely upon the ground that the act of April 26, 1906, did not prohibit or in any way restrain the alienation of inherited lands by full-blooded Creek Indians after August 8, 1907.

The facts will be found more fully set out in the brief of plaintiff in error.

There are the two questions involved:

First. Did the act of April 26, 1906, forbid the alienation of inherited lands by full-blood Creek Indians without the approval of the Secretary of the Interior, subsequent to August 8, 1907?

Second. If this act did forbid such alienation, was its enactment by Congress an exercise of constitutional power?

THE LEGISLATION INVOLVED, IN CHRONOLOGICAL ORDER.

Many acts of Congress, beginning with the general Indian allotment act of February 8, 1887, and ending with the act of May 27, 1908, which is the final expression of Congress upon the alienation of lands by

members of the Five Civilized Tribes, are necessary to a comprehensive discussion of the questions involved in this case. Some of these acts bear directly and others remotely upon the issues in the present controversy, but for the convenience of the court the provisions of all acts which throw any light upon the subject are herwith printed in full.

The italics used in various sections of the statutes are ours and are intended to attract attention to particular provisions which bear more or less directly upon the questions here involved.

1. The general allotment act of February 8, 1887.

The general allotment act of February 8, 1887, provides:

> SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart

from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (24 Stat., 390.)

SEC. 8. *That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory,* nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. (24 Stat., 391.)

2. The act of March 1, 1889, establishing a United States court for the Indian Territory.

The act of March 1, 1889 (ch. 333, 25 Stat., 783, 784), established a United States court for the Indian Territory "with exclusive jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this act defined not punishable by death or by imprisonment at hard labor, and in section 6 provides:

SEC. 6. That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents

of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more: *Provided, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only:* And provided further, That all laws having the effect to prevent the Cherokee, Choctaw, Creek, Chickasaw and Seminole Nations, or either of them, from lawfully entering into leases or contracts for mining coal for a period not exceeding ten years, are hereby repealed; and said court shall have jurisdiction over all controversies arising out of said mining leases or contracts and of all questions of mining rights or invasions thereof where the amount involved exceeds the sum of one hundred dollars.

3. The act of May 2, 1890, establishing the Indian Territory and the Territory of Oklahoma.

The act of May 2, 1890 (ch. 182, 26 Stat., 81, sec. 1; 93, sec. 29; 94, sec. 30; 94, 95, 96, sec. 31), provides:

SEC. 1. That all that portion of the United States now known as the Indian Territory, except so much of the same as is actually occupied by the Five Civilized Tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee outlet, together with that portion of the United States known as the Public

Land Strip, is hereby erected into a temporary government by the name of the Territory of Oklahoma. * * *

SEC. 29. That all that part of the United States which is bounded on the north by the State of Kansas, on the east by the States of Arkansas and Missouri, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma as defined in the first section of this act, shall, for the purposes of this act, be known as the Indian Territory; and the jurisdiction of the United States court established under and by virtue of an act entitled "An act to establish a United States court in the Indian Territory, and for other purposes," approved March first, eighteen hundred and eighty-nine, is hereby limited to and shall extend only over the Indian Territory as defined in this section; that the court established by said act, shall, in addition to the jurisdiction conferred thereon by said act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; and in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and enforced by such courts; and in all cases over which jurisdiction is conferred by this act or may hereafter be conferred by act of Congress; and the provisions of this act hereinafter set forth shall apply to said Indian Territory only.

SEC. 30. That for the purpose of holding terms of said court, said Indian Territory is hereby divided into three divisions, to be known as the first, second, and third division. * * * . All prosecutions for crimes or offenses hereafter committed in said Indian Territory shall be cognizable within the division in which such crime or offense shall have been committed. And all civil suits shall be brought in the division in which the defendant or defendants reside or may be found; but if there be two or more defendants residing in different divisions, the action may be brought in any division in which either of the defendants resides or may be found. * * * *Provided, however, That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply.*

SEC. 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby * * * put in force in the Indian Territory,

* * * * *

The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States.

4. The Dawes Commission Act.

The act of March 13, 1893 (27 Stat., ch. 209, pp. 612, 645, 646) provides:

SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the

survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

* * * * *

Such commissioners shall, under such regulations and directions as shall be prescribed

by the President, through the Secretary of the Interior, enter upon negotiation with the several nations of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and suited to the circumstances; for which purpose after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the lands of any such nation or tribe or band to be surveyed and the proper allotment to be designated; and, secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation or tribes or bands, or to any of the Indians thereof, for the extinguishment of their rights therein. But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a State in the Union.

The commissioners shall at any time, or from time to time, report to the Secretary of the Interior their transactions and the progress of their negotiations, and shall at any time, or from time to time, if separate agreements shall be made by them with any nation, tribe, or band, in pursuance of the authority hereby conferred, report the same to the Secretary of the Interior for submission to Congress for its consideration and ratification.

For the purposes aforesaid there is hereby appropriated, out of any money in the Treasury of the United States, the sum of fifty thousand dollars, to be immediately available.

Neither the provisions of this section nor the negotiations or agreements which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the Government of the United States has over or respecting said Indian Territory or the people thereof, or any other right of the Government relating to said Territory, its lands, or the people thereof.

5. The act of June 10, 1896, declaring the duty of Congress.

The act of June 10, 1896 (ch. 398, 29 Stat., 321, 340), provides:

> It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof.

6. The temporary act of June 7, 1897.

The Indian appropriation act of June 7, 1897 (ch. 3, 30 Stat., 62, 83, 84) provides:

> That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory (Indian Territory) shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts (p. 83).
>
> That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until

thirty days after their passage: *Provided*, That this Act shall not apply to resolutions for adjournment, or any acts, resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes (p. 84).

7. The Act of June 28, 1898, Confirming the Creek Agreement with the Dawes Commission.

The act of June 28, 1898 (ch. 517, 30 Stat., 495, sec. 13, p. 498; secs. 26, 27, 28, pp. 504, 505; sec. 30, p. 514), provides:

> SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void.
> * * *
>
> SEC. 26. That on and after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.
>
> SEC. 27. That the Secretary of the Interior is authorized to locate one Indian inspector in Indian Territory, who may, under his authority and direction, perform any duties required of the Secretary of the Interior by law, relating to affairs therein.
>
> SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished,

> and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

Section 30 amended and confirmed the agreement made between the Dawes Commission and the Creek Tribe on September 27, 1897, and provided that the agreement as amended should take effect if ratified by the Creek Tribe. The agreement provided for the allotment of the Creek lands, but it was never ratified. However, the provisions contained in sections 32 to 38 of the agreement are pertinent as evidencing the intention of Congress to continue to deal with the Creek Tribe *as a tribe*.

These sections are as follows:

> 32. The United States courts now existing, or that may hereafter be created in the Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation or use of the real estate in the territory occupied by the Muscogee or Creek Nation, and to try all persons charged with homicide, embezzlement, bribery and embracery hereafter committed in the terri-

tory of said Nation, without reference to race or citizenship of the person or persons charged with any such crime; and any citizen or officer of said nation charged with any such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States; and *the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.*

33. No act, ordinance, or resolution of the council of the Muscogee or Creek Nation in any manner affecting the land of the nation, or of individuals, after allotment, or the moneys or other property of the nation, or citizens thereof (except appropriations for the regular and necessary expenses of the government of the said nation), or the rights of any person to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such act, ordinance, or resolution passed by the council of said nation shall be approved by the executive thereof, it shall then be the duty of the national secretary of said nation to forward same to the President of the United States, duly certified and sealed, who shall, within thirty days after receipt thereof, approve or disapprove the same, and said act, ordinance, or resolution, when so approved, shall be published in at least two newspapers having a bona fide circulation throughout the territory

occupied by said nation, and when disapproved shall be returned to the executive of said nation.

34. Neither the town lots nor the allotment of land of any citizen of the Muscogee or Creek Nation shall be subjected to any debt contracted by him prior to the date of his patent.

35. All payments herein provided for shall be made, under the direction of the Secretary of the Interior, into the United States Treasury, and shall be for the benefit of the citizens of the Muscogee or Creek Nation. All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary.

36. The United States agrees to maintain strict laws in the territory of said nation against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.

37. All citizens of said nation, when the tribal government shall cease, shall become possessed of all the rights and privileges of citizens of the United States.

38. This agreement shall in no wise affect the provisions of existing treaties between the Muscogee or Creek Nation and the United States, except in so far as it is inconsistent therewith.

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8. The Original Creek Allotment Act of March 1, 1901.

The act of March 1, 1901 (ch. 676, 31 Stat., 861, 862, 863, 871, 872), provides:

> *That the agreement* negotiated between the Commission to the Five Civilized Tribes and the Muscogee or Creek Tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed, and the same *shall be of full force and effect when ratified by the Creek national council.* The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek national council and lay before it this agreement and the Act of Congress ratifying it, and if the agreement be ratified by said council, as provided in the constitution of said nation, he shall transmit to the President of the United States the act of council ratifying the agreement, and the President of the United States shall thereupon issue his proclamation declaring the same duly ratified, and that all the provisions of this agreement have become law according to the terms thereof: Provided, That such ratification by the Creek national council shall be made within ninety days from the approval of this Act by the President of the United States (pp. 861, 862). * * *
>
> 2. All lands belonging to the Creek tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only

lawful improvements on lands in actual cultivation. The appraisement shall be made under direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said commission. Each committee shall make report of its work to said commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said commission for its use in making allotments as herein provided.

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient

to make his allotment equal in value to the standard so fixed (p. 862).

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided,* That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, *the land shall descend to his heirs according to the laws of*

descent and distribution of the Creek Nation, free from such limitation.

8. The Secretary of the Interior shall, through the United States Indian Agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receives certificate therefor, he shall be immediately thereupon so placed in possession of his land (p. 864). * * *

40. *The Creek school fund shall be used, under direction of the Secretary of the Interior, for the education of Creek citizens, and the Creek schools shall be conducted under rules and regulations prescribed by him,* under direct supervision of the Creek school superintendent and a supervisor appointed by the Secretary, *and under Creek laws, subject to such modifications as the Secretary of the Interior may deem necessary* to make the schools most effective and to produce the best possible results.

All teachers shall be examined by or under direction of said superintendent and supervisor, and competent teachers and other persons to be engaged in and about the schools with good moral character only shall be employed, but where all qualifications are equal preference shall be given to citizens in such employment.

All moneys for running the schools shall be appropriated by the Creek national council,

not exceeding the amount of the Creek school fund, seventy-six thousand four hundred and sixty-eight dollars and forty cents; but if it fail or refuse to make the necessary appropriations the Secretary of the Interior may direct the use of a sufficient amount of the school funds to pay all expenses necessary to the efficient conduct of the schools, strict account thereof to be rendered to him and to the principal chief.

All accounts for expenditures in running the schools shall be examined and approved by said superintendent and supervisor, and also by the general superintendent of Indian schools, in Indian Territory, before payment thereof is made.

If the superintendent and supervisor fail to agree upon any matter under their direction or control, it shall be decided by said general superintendent, subject to appeal to the Secretary of the Interior; but his decision shall govern until reversed by the Secretary (pp. 871, 872). * * *

42. *No act, ordinance, or resolution of the national council of the Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof, except appropriations for the necessary incidental and salaried expenses of the Creek government as herein limited, shall be of any validity until approved by the President of the United States.* When any such act, ordinance, or resolution shall be passed by said council and approved by the principal chief, a true and correct copy thereof, duly certified,

shall be immediately transmitted to the President, who shall, within thirty days after received by him, approve or disapprove the same. If disapproved, it shall be so indorsed and returned to the principal chief; if approved, the approval shall be indorsed thereon, and it shall be published in at least two newspapers having a bone fide circulation in the Creek Nation.

43. The *United States agrees to maintain strict laws in said nation against the introduction*, sale, barter, *or giving away of liquors* or intoxicants of any kind whatsoever.

44. *This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe* except so far as inconsistent therewith.

45. All things necessary to carrying into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior.

46. *The tribal government of the Creek Nation shall* not *continue* longer than March fourth, nineteen hundred and six, *subject to such further legislation as Congress may deem proper.*

47. Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress (pp. 872, 873).

The act of March 1, 1901 (ch. 6, 31 Stat., 861), was ratified by the National Council of the Creek Tribe May 25, 1901, and proclaimed by the President June 25, 1901. (32 Stat., part 2, 1971, 1972.)

9. The Act of March 3, 1901, Recognizing the Continuance of Tribal Government.

The appropriation act of March 3, 1901 (ch. 832, 31 Stat., 1058, 1077), provides in part as follows:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.
>
> That no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity until approved by the President of the United States. *When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the principal chief thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same.* Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

10. The so-called citizenship act of March 3, 1901.

The so-called citizenship act of March 3, 1901 (ch. 868, 31 Stat., 1447), provides:

> That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hundred and ninety, is hereby amended as follows, to wit: After the words "civilized life," in line thirteen of said section six, insert the words "and every Indian in Indian Territory."

11. The act of May 27, 1902—Descent and distribution of Creek lands according to the provisions of chapter 49 of Mansfield's Digest.

The appropriation act of May 27, 1902 (32 Stat., 258, ch. 888), provides:

> That the Act entitled "An Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes," approved March first, nineteen hundred and one, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory.

Mansfield's Digest of the Statutes of Arkansas, edition of 1884 (ch. 49, sec. 2522), provides as follows:

> SECTION 2522. When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall

be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

12. The supplementary Creek allotment act of June 30, 1902.

The act of June 30, 1902 (ch. 1323, 32 Stat., 500, 501, 503), amending the original allotment act of March 1, 1901, provides:

6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek

Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49 (p. 501).

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children

born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity (p. 503).

17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is reenacted to read as follows:

"Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." * * * (P. 504.)

19. Section 8 of the agreement ratified by said act of March 1, 1901, is amended and as so amended is reenacted to read as follows:

The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment *in unrestricted possession of his land* and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land, *and during the continuance of the tribal government the Secretary of the Interior, through such Indian agent, shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law* (p. 504).

Sections 21 and 22 of the act of June 30, 1902 (ch. 1323, 32 Stat., 505), provide as follows:

21. *This agreement shall be binding* upon the United States and the Creek Nation, and upon all persons affected thereby *when it shall have been ratified by Congress and the Creek National Council*, and the fact of such ratification shall have been proclaimed as hereinafter provided.

22. *The principal chief*, as soon as practicable after the ratification of this agreement by Congress, *shall call an extra session of the Creek Nation council and submit this agreement*, as ratified by Congress, to such council for its consideration, *and if the agreement be ratified*

rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, territorial, or municipal authority. * * * *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

14. The act of April 21, 1904, distinguishing between Indians and persons not of Indian blood.

The act of April 21, 1904 (ch. 1402, 33 Stat., 189, 204, 205), contains an important provision distinguishing as to restrictions between members of the Five Civilized Tribes of Indians who are of Indian blood and members who are not of Indian blood. The pertinent provision is in full as follows:

> * * * And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and *all restrictions upon the alienation of all other allottees of said tribes*, except minors, and *except as to homesteads, may, with the approval of the Secretary of the Interior, be removed*

under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.

15. The act of April 28, 1904, further extending the laws of Arkansas to Indians.

The act of April 28, 1904 (ch. 1824, 33 Stat., 573), provides:

SEC. 2. All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.

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16. The joint resolution of March 2, 1906, continuing tribal government.

The joint resolution of March 2, 1906 (34 Stat., 822), provides:

> *That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes* under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

17. The act of April 26, 1906, providing a comprehensive system for the alienation of lands by full-blood Indians.

The act of April 26, 1906 (34 Stat., 137–148; ch. 1876, secs. 19, 20, 22, and 23), provides:

> SEC. 19. *That no full-blood Indian* of the Choctaw, Chickasaw, Cherokee, *Creek* or Seminole tribes *shall have power to alienate, sell,* dispose of, or encumber in any manner any of *the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act,* unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood In-

dians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee (p. 144).

SEC. 20. That after the approval of this Act *all leases and rental contracts*, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, *of full-blood allottees*

of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory (p. 145).

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe* (p. 145).

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner (p. 145).

SEC. 28. *That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States (p. 148).

18. The act of May 8, 1906, postponing acquisition of United States citizenship by allottees.

The act of May 8, 1906 (34 Stat., 182), amended section 6 of the act of February 8, 1887 (24 Stat., 390), to read as follows:

> SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided,* That the Secre-

tary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.*

19. The Oklahoma enabling act.

The act of June 16, 1906 (ch. 3335, 34 Stat., 267, 268, 269, 270), provides:

> *That nothing contained in the said constitution shall be construed to limit or impair* the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit *or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.* (P. 267, 268.)

* * * * *

And said convention shall provide in said constitution— * * *

Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian Reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation (p. 269).

* * * * *

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States (p. 270).

20. The regulations concerning alienation of inherited lands.

For the purpose of carrying into effect the provisions of sections 19, 20, and 22 of the act approved April 26, 1906, the Secretary of the Interior on July 7, 1906, issued rules and regulations concerning the

leasing of allotted and inherited lands, and concerning the sale of inherited lands by full-blood Indians.

Section 29 of the above regulations provides:

> Adult full-blood Indians, "heirs of any deceased Indian of any of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged," desiring to sell or convey the land inherited from such decedent, may apply to the Indian agent, Union Agency, Muskogee, Indian Territory, or to such other officer as may be designated by the Secretary of the Interior for the purpose, by petition, in duplicate, containing an accurate description of the land and improvements thereon, praying that such land may be sold in accordance with these regulations, and agreeing that the proceeds to be derived therefrom shall be placed in the most convenient United States depository to their credit, subject to their check, or in case of minors and incompetents, subject to the check of their legal guardian, for amounts not exceeding fifty dollars to each in any one month, when approved by the Agent or other officer in charge, and only when so approved, and if same is in excess of fifty dollars per month, upon the approval of such Agent only when specifically authorized by the Commissioner of Indian Affairs. The Petition shall be signed by all persons having any interest in the land, whether full-blood Indians or otherwise, and, in cases of minors and incompetents, by their legal guardians,

and shall set forth every material fact necessary to show full title to the land, and why it would be for the best interests of the owner or owners to sell it. It shall be the duty of the officer forwarding such petition to certify the quantum of Indian blood possessed by each of the petitioners as the same appears from the rolls of citizens of the Five Civilized Tribes approved by the Secretary of the Interior.

The rules and regulations above referred to are contained in Senate Document No. 396, part 4, Fifty-ninth Congress, second session, page 308, entitled "Rules and regulations governing the Department of the Interior in its various branches, furnished in response to a resolution adopted by the Senate of the United States February 1, 1907; in four parts. Ordered to be printed February 26, 1907."

21. The resolution of the National Council of the Creek Nation ratifying sections 19, 22, and 23 of act of April 26, 1906.

On August 3, 1907, the Creek National Council adopted the following resolution:

"Resolved by the National Council of the Muskogee (Creek) Nation, in extra session assembled; that Section nineteen (19) of the Act of Congress of the United States approved April 26th, 1907, (Public No. 129), which reads as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner of the lands allotted

to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress; and for all purposes of the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before the removal of restrictions, be and the same is hereby declared void; Provided, further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long

as the title remains in the original allottee," is hereby ratified, confirmed and approved.

Be it further resolved that Section twenty-two (22) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129) which reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe,"
is hereby adopted, ratified and confirmed.

Be it further resolved that Section twenty-three (23), of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129), which reads as follows:

"Every person of lawful age and sound mind may by last will and testament devise and

bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowleged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner,"

is hereby adopted, ratified and confirmed.

August 2nd, 1907.

DAVID ANDERSON,
Pres. House of Kings, Pro. Tem.
SAM. GRAYSON,
Clerk.

Concurred in August 2nd, 1907.

ALEX DAVIS,
Speaker House of Warriors.
MILDRED CHILDERS,
Clerk.

Approved August 3rd, 1907.

P. PORTER,
Principal Chief.

THE WHITE HOUSE,
Washington, September 17, 1907.
APPROVED:
T. ROOSEVELT.

I hereby certify that I am the officer having custody of the records pertaining to the Acts and Resolutions passed by the National Council of the Creek Nation and that the above and foregoing is a true and correct copy of a Resolution passed by said Council August 2, 1907, approved by the Principal Chief of the Creek Nation August 3, 1907, and by the President

September 17, 1907, ratifying and confirming Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906.

THOS. RYAN,
Acting Commissioner
to the Five Civilized Tribes.

Muskogee, Okla., Feb. 28, 1910.

22. The Oklahoma constitutional provisions concerning Indians.

The constitution of the State of Oklahoma (1907) provides:

ART. I, SEC. 3. The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

SEC. 7. The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of the State, heretofore known as the Indian Territory and the Osage Indian Reservation, and within any other parts of the State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of the State into the Union, and thereafter until the people of the State shall other-

wise provide by amendment of this Constitution and proper State legislation.

ART. XII, SEC. 1. * * *. That nothing in the laws of the United States, or any treaties with the Indian tribes in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State.

Section 497 (Bunn's Constitution of the State of Oklahoma, p. 137) is as follows:

SEC. 497. Be it Ordained by the Constitutional convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, "An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states; and to Enable the People of New Mexico and of Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states," approved June the sixteenth, Anno Domini, Nineteen Hundred and Six.

23. The act of May 27, 1908, continuing restrictions upon the sale of inherited lands by full-blood Indians.

The act of May 27, 1908 (35 Stat., 312, 313, 315, secs. 1, 2, 8, and 9), provides:

SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of

the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and *all allotted lands of enrolled full-bloods*, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, *shall not be subject to alienation*, contract to sell, power of attorney, or any other incumbrance *prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions*, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights

of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma (p. 312).

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years (pp. 312, 313).

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SEC. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of the said section, the words "or a judge of a county court of the State of Oklahoma" (p. 315).

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend

to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section (p. 315).

ARGUMENT.

FIRST.

The act of April 26, 1906, forbade the alienation of inherited lands by full-blood Creek Indians without the approval of the Secretary of the Interior subsequent to August 8, 1907.

This act is entitled "An act to provide for a final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes." Its title suggests that Congress intended its provisions to fully cover the several subjects dealt with by it.

There is nothing in the language of any one of the pertinent sections, to wit, 19, 20, 22, and 23, which, in the remotest degree, suggests dependence upon previous rules and regulations. If the sections are taken by themselves as an expression of the intention of Congress in respect to the subjects dealt with by them, there is no difficulty in determining that intention. The language of the statute itself is amply sufficient to convey the meaning of Congress. It is unnecessary to go beyond its terms to determine fully the purpose of Congress in respect to the alienation of allotted lands received by inheritance.

So far as the construction of the act is concerned, an examination of the heterogeneous mass of legislation which preceded its enactment can serve no useful purpose, except to suggest the necessity of a comprehensive act providing for a uniform system for the alienation of land by full-blood Indians and completely superseding the illogical distinctions previously existing between the Indians of the same degree of blood because they happened to belong to different tribes. The act of April 26, 1906, is replete with indications that Congress saw the need of such a comprehensive act and attempted to meet that need.

In short, this act makes a "final disposition" of the matter of selling, leasing, and devising the lands of full-blood Indians of the Five Tribes, whether such lands are held by allotment or inheritance. If it is read and construed in the light of this purpose, and its plain terms are not confused by dragging in other statutes which are superseded, there is no difficulty in understanding its provisions. This act of 1906 forbids full-blood Indians to *sell their allotted lands* for 25 years; it forbids them to *lease their lands* (with a certain exception) without the approval of the Secretary of the Interior; it forbids them to *sell their inherited lands* without the approval of the Secretary of the Interior; and it forbids them even to *devise their lands*, to the exclusion of certain natural heirs, without the approval of a United States judge or commissioner. This is the plain,

simple meaning of the words used in sections 19, 20, 22, and 23 of the act, and the mere reading of these sections disposes of the present case in so far as the construction of the act is concerned.

A.

Section 22 of the act of April 26, 1906, supersedes previous restrictions upon the alienation of allotted lands received by inheritance and prescribes the only rule by which full-blood heirs may alienate said lands.

Section 22 provides:

> That adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. (34 Stat., 145.)

The first sentence of the section unquestionably prescribes a rule complete in itself for the alienation of allotted lands received through the inheritance by adult heirs. Unless clearly inconsistent with other provisions of the same act, it must be taken as the only enforcible rule on the subject, for no matter what may have been the previous restrictions upon the alienation of such lands by adult heirs they are superseded by the express terms of this section. The only pertinent exception to the rule of unrestricted alienation by adult heirs is to be found in the last sentence of the section.

The legislative consent to alienate inherited lands contained in section 22, being complete in itself, the same for all tribes, and in no way dependent upon previous restrictions and consents, it is to be presumed, in the absence of express language to the contrary, that the limitation upon that consent is equally independent of previous restrictions. The purpose of the section is not to remove restrictions upon the alienation of allotted lands received by inheritance, but to prescribe a new rule for the alienation of such lands. The reason for this is that if Congress had merely removed restrictions and made an exception thereto for the protection of full-bloods, it might have been necessary to look to previous restrictions in order to determine the scope of the exception. But here Congress, dealing comprehensively with the subject of alienating allotted lands received by inheritance, has prescribed a general rule for their free alienation subject to an expressed exception in favor of

full-bloods, and that, too, in an act for the first time clearly recognizing their incompetence as a class.

The defendants in error contend that the words "under this provision" make it necessary to refer to other statutes and other restrictions. This is an obvious error. The very contrary is true; for the words "under this provision" not only constitute a natural means of introducing a uniform exception to a uniform rule, but perform the useful purpose of preventing the last sentence of the section from being construed as applicable to other lands than those referred to in the first sentence of the section.

The last sentence contains general words prohibiting all conveyances by full-blood heirs unless approved by the Secretary of the Interior; consequently except for the words "under this provision" the last sentence might well have been held applicable to all conveyances of real estate by full-blood heirs. In fact, the words "under this provision" are a natural substitute for the long and cumbersome phrase in the first sentence describing the character of lands regulated by the section and will be given their full force and effect if the last sentence is construed as if it read "all conveyances of *allotted lands received through inheritance* by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

B.

The character and comprehensive nature of the system provided for by the other sections of the act confirms the view that the last sentence in section 22 was intended to prescribe the only rule by which full-blood heirs might alienate allotted lands inherited by them.

Sections 19, 20, and 23 each, without question, superseded the previous rules and regulations concerning the respective matters with which they deal. Further than that, they each provide a uniform rule for full bloods and the same rule for all tribes.

As to each of these propositions the sections speak for themselves, and it is unnecessary to do more than to quote the pertinent language.

Section 19 provides:

> That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability

of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

Section 20 provides:

That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Creek, or Seminole tribes shall be in writing and subject to approval by

> the Secretary of the Interior and shall be absolutely void and of no effect without such approval.

Section 23 provides:

> That no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

Unquestionably the purpose of each of the sections is to especially safeguard incompetent full-bloods. Not only is this true, but the character of the safeguards provided for in sections 19, 20, and 23 cogently opposes a construction of section 22 that does not fully protect the full-blood in respect to the alienation of his inherited land.

The fact that section 19 declares the full-blood Indian to be incompetent to deal with a certain class of his lands for 25 years, under any circumstances whatsoever, strongly opposes the assumption that Congress intended that in the case of the Creeks, within 14 months from the passage of the act the full-blood heir should be permitted to dispose of the allotted land inherited by him, free from all restrictions.

The provisions of section 20 as to leases render such an assumption untenable. It imposes restrictions upon the leasing of all lands, except homesteads, for an indefinite period or for an implied period of 25 years. It is well-nigh inconceivable

that Congress should have imposed restrictions upon the leasing of inherited lands without imposing similar restrictions upon the alienation of the same, and the express language of section 22 leaves no doubt of the intention of Congress to impose restrictions upon allotted lands whether received directly by allotment or indirectly by inheritance. The character of the lands which Congress intended to deal with is fully described by the express terms of the section as "land other than homesteads. The use of the word "allottees" does not narrow the scope of the section. In 1906 practically all the Indians of the Five Civilized Tribes were "allottees," and the term "full-blood allottee" is a natural substitute for full-blood Indian.

Further than that, the use of the words "original allottee" in the preceding section indicates that Congress would have used that term if it had meant original allottee.

Still further and conclusively, in the act of April 21, 1904 (c. 1402, 33 Stat., 189, 204, 205), Congress used the term "allottees" as descriptive of Indian heirs in possession of allotted lands received through inheritance, as well as descriptive of allottees in possession of their original allotments. There can be no doubt as to this unless we are to assume that by the act of April 21, 1904, Congress intended to subject inherited allotments to a higher degree of restrictions than original allotments.

The restrictions imposed upon the alienation of allotted lands by sections 14 and 15 of the act of

July 1, 1902 (32 Stat. 726, 727), relating to Cherokees, ran with the land. Therefore the act of April 21, 1904, authorizing the removal of restrictions upon the alienation of the land of "allottees" must be taken either as using the term "allottee" as inclusive of heirs in possession of inherited allotments, or as providing for greater restrictions upon the alienation of inherited allotments than upon original allotments.

Many other instances might be given from which it clearly appears that Congress used the term "allottee" as descriptive of an Indian in possession or entitled to the possession of allotted lands, whether received directly by allotment or indirectly by inheritance.

In section 19 of the act of June 30, 1902, the Secretary of the Interior is directed, during the continuance of the tribal government, to protect "the allottee in his right to possession against any and all persons." The fact that the restriction upon the alienation prescribed by section 16 of that act ran with the land in the hands of heirs forbids the assumption that Congress did not intend the Secretary of the Interior to protect the allottee in respect to allotted lands received by inheritance.

The fact that section 23 restrains the full-blood Indian as to the devising of any of his real estate, allotted or inherited, suggests that Congress would not have left him free to dispose of his inherited lands while living, free from all restraint.

C.

The statutes in pari materia make for, not against, the Government's contention that the rule prescribed by the last sentence of section 22, is complete in itself and independent of all previous rules and regulations.

Turning to the earlier restrictive statutes for the separate nations constituting the group of Five Civilized Tribes, as those statutes stood when the act of April 26, 1906, was passed, we find this heterogeneous state of affairs:

The act concerning the Seminoles forbade alienation "prior to the date of patent," and the patent was to be made by the principal chief of the tribe when the tribal government ceased to exist. (Act of July 1, 1898; 30 Stat., 568; ch. 542.) The legislation concerning the Creeks was contained in the act of June 30, 1902, which forbade alienation generally for five years from the date of the approval of the supplementary agreement which that act confirmed, viz., until August 8, 1907. (32 Stat., 503; ch. 1323.) The Cherokees were under an act which provided in one section that there should be no alienation within five years from the ratification of the act, and in another section that their allotments should be inalienable for five years after issue of patent (act of July 1, 1902, 32 Stat., 717; ch. 1375). The Choctaws and Chickasaws were under this provision: "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issue

of patent as follows: One-fourth of the acreage in one year, one-fourth in three years, and the balance in five years—in each case from the date of the patent; provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw governments for less than its appraised value." (Act of July 1, 1902, 32 Stat., 641, 643; ch. 1362.)

The defendants in error would now have the act of April 26, 1906 (which, from that date, expressly prohibits any and all conveyances by full-blood heirs of any and all of the five tribes, without the approval of the Secretary of the Interior), treated as continuing these old distinctions between the same class of Indians of the different tribes; and in ascertaining what section 22 of the act of April 26, 1906, means, with respect to a particular tribe, they contend that we must go back to the special statute affecting that tribe and construe the new act, not by the plain words used, but in conjunction with other words in other acts which are clearly superseded. Such a construction would produce a jumble of legislation utterly impossible of enforcement. It would completely destroy the plan adopted by Congress of treating all full-bloods, of whatever tribe, as a class. It would make impossible of ascertainment the exact date when full-blood heirs in several of the tribes may alienate their lands without governmental supervision; and in the instances in which the date could be determined, it would make wholly indefensible distinctions between the various tribes.

For example, such a construction would assume that Congress intended that full-blood Creek heirs might alienate their inherited lands within 15 months after the passage of the act, free from all restraint; that full-blood Cherokees might alienate such lands at various dates, according to the date of their individual patent; that full-blood Choctaws and Chickasaws might alienate under certain conditions a part of their inherited lands within 2 or 3 months, and a part within 2 or 3 years, and that full-blood Seminoles might not alienate at all until the termination of their tribal government, which is still in existence. And in order to determine the date at which full-blood heirs of the different tribes may freely convey their lands it is necessary to insert the previous acts relating to the different tribes, to wit, in the case of the Creeks the act of June 30, 1902 (C. 1323, 32 Stat., 500, 501, 503); in the case of the Cherokees, the act of July 1, 1902 (C. 1375, 32 Stat., 716, 717); in the case of the Choctaws and Chickasaws, the act of July 1, 1902 (C. 1362, 32 Stat., 641, 642); in the case of the Seminoles the act of July 1, 1898 (C. 542, 30 Stat., 567, 568).

It is incredible that Congress, by the act of April 26, 1906, which purports in form and by the comprehensiveness of its treatment to regulate all sorts of alienations by full-blood Indians, intended to leave part of the subject—the alienation of inherited lands—in its old hodge-podge condition.

Further, it is to be observed that in the earlier acts generally the period of restraint was the same as to direct and inherited allotments. No distinction was

made. Why consider it otherwise under the act of April 26, 1906? A full-blood develops and grows to capacity no faster because his land is of one or another class.

But the last and most important argument from general legislation, outside the act of April 26, 1906, itself, is to be found in the present statute of May 27, 1908, which went into effect July 27, 1908, and which undertakes to give system to the law concerning the "status of the land allotted heretofore or hereafter to the allottees of the Five Civilized Tribes" (section 1). This act provides in section 9 as follows:

> That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. (35 Stat., 315.)

It clearly appears from this last legislative expression on the subject that Congress regarded full-blood Indian heirs as still under restraint respecting the alienation of their land and intended merely to substitute the appropriate court in Oklahoma (which State in the meantime had been admitted to the Union) for the Secretary of the Interior as the authority to protect such heirs in all future conveyances.

But defendants in error contend that full-blood Creeks became free to sell their inherited lands on

August 8, 1907. Now let us test this in another way. It means that *before August 8, 1907*, a full-blood Creek could not alienate his inherited land without the approval of the Secretary of the Interior; that *after July 27, 1908*, a full-blood Creek could not alienate his inherited land without the approval of the court; but that *between August 8, 1907, and July 27, 1908*, a full-blood Creek could alienate his inherited land without any supervision whatsoever. In other words, Congress is supposed deliberately to have provided a period of eleven months during which Marchie Tiger, and other Indians in a like situation, might dispose of their land without any restraint whatever.

We submit that any construction of section 22 which leads to such absurd consequences is a forced and not a natural construction, and ought not to be adopted if any other can be justified.

We submit further that no forced construction of section 22 is necessary to support the Government's contention. It means just what it says, that full-blood heirs desiring to take advantage of the provision permitting the alienation of inherited lands must secure the approval of the Secretary of the Interior. In other words, it means that so far as full-blood heirs are concerned Congress determined to continue indefinitely supervision over the alienation of their lands, and this fact is conclusively shown by the legislative construction given to earlier statutes by the act of May 27, 1908.

D.

Looking at the matter generally and broadly there is a strong presumption against Congress permitting the alienation of land by Indians free from all restraint.

Even the tribal lands of Indians under the uniform policy of this country could not be alienated by the Indian tribe itself without the consent of Congress. That resulted from the fact that the lands were granted to the Indians for the use of the tribe and not for alienation, and also because the grant expressly declared that the tribal lands should revert to the United States upon the extinction of the tribe or their abandonment by the tribe. The general allotment act of February 8, 1887 (24 Stat., 388, 389, ch. 119), which relates to Indians in general, restrained all alienation of allotments under it for 25 years from the time of allotment.

All special agreements with the several tribes concerning their allotments, and all special acts before 1906 relating to those allotments, continued and applied, in varying ways and for different periods, the general policy of restricting alienation. The act of April 26, 1906, continued without much change the previous restraints upon mixed bloods, and established a new system of restraints for full-bloods. Finally, the present statutory rule as to alienations by members of the Five Civilized Tribes (act of May 27, 1908, 35 Stat., 312, ch. 199), beside restraining full-bloods generally until 1931, specifically restrains full-blood heirs from alienating their inherited allotments (secs. 1 and 9).

The principle that statutes in derogation of common right shall be construed strictly has no application; or, rather, makes against defendants in error. "Common right" as to this case is common rule for the Indians; and that always has been—not freedom to part with their land—but incapacity to deal with their land at all or without the supervision of some official mentor.

E.

Section 22 has been uniformly construed, by the tribunals that have had occasion to construe it, as superseding previous rules for the alienation of inherited lands by full-blood heirs and as providing the only rule by which said lands could be alienated.

The only exception to this rule of uniform construction seems to be the present decision of the supreme court of Oklahoma. The authority of the Oklahoma court is weakened by the fact that it failed to refer to the important act of Congress of April 21, 1904, providing a uniform rule for all the tribes by which allotted lands could be alienated with the approval of the Secretary of the Interior, and by the further fact that it seems to have assumed that there is a natural presumption against the imposition of additional restrictions upon the alienation of lands, even in the hands of incompetent full-blood Indians.

The department charged with the administration of the act construed it as imposing restrictions upon the alienation of inherited lands of full-blood heirs subsequent to August 8, 1907. (Sec. 29, of the rules and regulations issued by the Secretary

of the Interior on July 7, 1906, reported in S. Doc. No. 396, pt. 4, 59th Cong., 2d sess., p. 308.)

In the case at bar the United States Court for the Western District of Indian Territory so construed the act. (Rec., p. 23.)

It was so construed by the Court of Claims in *William Brown et al.* v. *United States,* 44 Court of Claims, 283, 304.

Since the original argument of this case it has been so construed in an elaborate and careful opinion by Judge Campbell. (*United States of America, complainant,* v. *Elmer Shock, county treasurer, defendant,* Circuit Court of the United States for the Eastern District of Oklahoma, No. 1202 equity, not yet reported.) In that case the Government sought to enjoin the defendant from selling inherited land of full-blood Creek Indians for taxes. Judge Campbell reached the conclusion that the lands in question were free from State taxation so long as subject to restrictions and decided that the restrictions imposed by the last sentence in section 22 of the act of April 26, 1906, continued in full force and effect subsequent to the 8th day of August, 1907. His opinion is in part as follows:

> But even though there be a distinction between the class of lands treated in section 19 and those treated in section 22, the one being the original allotment and the other the inherited lands, still it does not follow that Congress only intended to provide for the approval of the Secretary of the Interior until the expiration of the term for which

restrictions were imposed by the supplemental agreement. Section 29 of the act provides "that all acts or parts of acts inconsistent with the provisions of this act be, and the same are, hereby repealed." The five years' term, for which the restrictions as to surplus lands were originally imposed, would expire in August, 1907, a little more than a year after the passage of this act. Congress is presumed to have legislated with this in mind, and it is not to my mind reasonable that had it only intended this provision to be effective for that short space of time, it would have used the general language without qualification. Had such been the intention, it is my opinion that it would have been made clear by a qualification that such approval would not be required after the expiration of the restrictions provided in the two agreements referred to. That it did not do so convinces me that it was intended to extend this restriction upon the sale of these inherited lands in the hands of the full-blood heirs beyond the time provided in the agreements. Now, if Congress intended, as defendant contends, that after August 8, 1907, a full-blood heir might sell his inherited lands without restrictions, then it would be unreasonable to suppose that it would provide in the same act that he can not dispose of the same character of lands by will without restriction. But in section 23, the very next section, it was provided:

"Every person of lawful age and sound mind may by last will and testament devise

and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory or a United States commissioner."

That this approval of the court was necessary after August 8, 1907, is clear from the subsequent act of May 27, 1908 (35 Stat., 312), wherein it is provided that section 23, above referred to, shall be amended by adding the words "or a judge of a county court of the State of Oklahoma." This clearly shows that Congress considered the provision as to the approval of wills of full-bloods to be in effect. It applies to any will of a full-blood devising real estate, making no distinction between his personal allotment and lands inherited by him. This is inconsistent with the idea that all restrictions upon the sale of his inherited lands expire on August 8, 1907. It was held in *United States* v. *Freeman* (3 How., 556) that if it can be gathered from a subsequent statute *in pari materia* what meaning the legislators attached to the words of a former statute, this will amount to a legislative definition of its meaning, and will govern the consideration of the first statute. The continuation of this provision regarding wills in the subsequent act referred to amounts to a legislative declaration that it was not the intention of Congress in the act of April 26, 1906, that

> all restrictions upon the alienation of lands inherited by full-bloods should expire on August 8, 1907. It was the intention of Congress that such restrictions should continue beyond that date and until removed by subsequent legislation. It follows that the interest of all full-blood Creek heirs in the inherited lands owned by them on March 1, 1908, was not subject to taxation.

Later on, in discussing the propriety of distinguishing between the members of the various tribes according to the degree of Indian blood, he says:

> The varying degrees of blood most naturally become the lines of demarcation between the different classes, because experience shows that, generally speaking, the greater percentage of Indian blood a given allottee has the less capable he is by natural qualifications and experience to manage his property. There are of course notable exceptions, but this is the rule.

F.

The failure of Congress in the last sentence of section 22 to expressly provide for the time of its continued operation makes for, and not against, the construction relied upon by the Government.

In the first place it is to be noted that all through the act of April 26, 1906, there is the suggestion of further legislation by Congress, and no doubt it was contemplated that section 22 forbidding the alienation of inherited lands by full-blood heirs without the approval of the Secretary of the Interior would be

amended or supplemented by other provisions for their protection as their capacity to take care of themselves developed. This was in fact done when the act of May 27, 1908, was passed, substituting the easier and more convenient approval of the Oklahoma courts for that of the Secretary of the Interior to conveyances of inherited lands.

So in section 19 of the act of April 26, 1906, express reference is made to further legislation by Congress. That section forbids the alienation of allotted lands for 25 years *"unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress."*

So, further, it appears that in section 20 of the act of April 26, 1906, which refers to leases and rental contracts, no time limit is fixed within which they must have the approval of the Secretary of the Interior, and, as we have heretofore observed, this section 20 appears clearly to refer to all classes of lands, whether secured by allotment or inheritance. Thus, if defendants in error are right in their construction of section 22 the result would be that after August 8, 1907, a full-blood Indian could *sell* his inherited lands without any restriction whatever, but he could not *lease* them without the approval of the Secretary of the Interior.

Further, section 23 of the act of April 26, 1906, with respect to the wills of full-blood Indians, fixes no time limit within which, under certain circumstances, they must be acknowledged before and approved by a United States judge or commissioner. Thus, again,

if defendants in error are correct as to the construction of section 22 it would follow that after August 8, 1907, a full-blood Indian may sell his inherited lands without any restriction whatever, but he may not devise any real estate, cutting off parent, wife, spouse, or children, without the approval of a court or commissioner of the United States.

Finally, it appears in the very last act on the subject, that of May 27, 1908, that Congress fixed no express date within which the conveyances of inherited lands must be approved by the court having jurisdiction of the estate of the deceased allottee.

The reason for all this is very plain. With respect to Indian heirs Congress realized that, as time goes on, there will be an ever-diminishing need for distinction between full and mixed blood, for the full-bloods will be decreasing in number. Further than this, it was doubtless appreciated that while the time limit was appropriate with respect to the supervision of conveyances by original allottees of the full-bloods there will be instances of numerous heirs to a single allotment, and their protection will be better secured by the Secretary of the Interior or by a court of competent jurisdiction than by a time limit in the statute.

Again, it was no doubt recognized that the younger generations of full-bloods will be better educated and more competent to take care of themselves, so that as to them an arbitrary and inflexible 25-year limit upon their right of alienation would not be so appropriate as a provision authorizing the con-

veyance of their lands at any time, subject only to the approval of the Secretary, and later of the court, trusting to this official discretion the authority to determine, as each case arose, whether or not the Indian owner was securing a fair bargain for his land.

With this purpose in view the construction of section 22 becomes very simple. It is designed to provide for the full freedom of adult heirs of any deceased Indian of either of the five tribes to sell and convey his inherited land without let or hindrance, except that as to full-bloods conveyances made "under this provision" (the only provision on the subject) must have the approval of the Secretary of the Interior under such rules and regulations as he may prescribe.

SECOND.

The act of April 26, 1906, is constitutional.

The plenary power of the United States over the Indian and his lands comes from three sources: *First*, article 1 of section 8 of the Federal Constitution, which provides that "Congress shall have power * * * to regulate commerce with the Indian tribes;" *second*, article 4, section 3, of the Constitution, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" and *third*, the moral obligation of a superior and civilized nation to protect a dependent and uncivilized race over whose former domain it has assumed control.

That unallotted tribal Indian lands are always within the control of Congress is not open to question.

Cherokee Nation v. *Hitchcock*, 187 U. S., 294.
Lone Wolf v. *Hitchcock*, 187 U. S., 553.
Stephens v. *Cherokee Nation*, 174 U. S., 445.
Conley v. *Ballinger*, 216 U. S., 84.

That even lands allotted to Indians in severalty may be continued under a direct supervision of Congress can not now be disputed.

United States v. *Rickert*, 188 U. S., 432.

That Congress may continue, or impose anew, restrictions upon the alienation of allotted Indian lands, even after the limitations reserved in the original grant have expired, has also been decided.

Stevens v. *Smith*, 10 Wall., 334.
Jones v. *Meehan*, 175 U. S., 1.

In *Stevens* v. *Smith* (*supra*) Congress, by an act of 1860, *passed 35 years after the grant* to the Indian in that case, forbade the future disposition of the lands granted without the approval of the Secretary of the Interior, and this court declared a conveyance void which did not comply with such requirement.

In *Jones* v. *Meehan* (*supra*), Mr. Justice Gray traces the history of the various statutes beginning with the act of July 22, 1790 (1 Stat., c. 33, sec. 4), forbidding the alienation of Indian lands without the consent of the United States, and concludes that whenever such alienation is forbidden, even though the act imposing the restriction was passed long after the grant to the individual Indian, still, so long as

the land is in his possession, and no conveyance has been made creating rights in third parties, Congress may restrain the Indian's disposition of the land, and he may not dispose of it except in the manner authorized by Congress.

But it is said in the present case that Congress on March 3, 1901, conferred Federal citizenship upon Marchie Tiger and other Indians of the five tribes and that such citizenship is a final bar to any further supervision by Congress over the alienation of their lands. The first answer suggested is that if this is true, then Marchie Tiger was a citizen on June 30, 1902, when the land he inherited was allotted, and we have the anomalous situation of the United States making treaties with its own citizens and having those treaties ratified not by the citizens themselves but by the national council of their own tribal government, to which they still owe allegiance.

We will present in their natural order the several considerations which seem clearly to show that Congress could and did retain full power to legislate with respect to the lands here involved, without regard to the citizenship claimed to have been conferred upon the Indians.

A.

It is doubtful if any citizenship whatever was conferred upon the Creek Indians.

We submit that a close examination of the so-called citizenship act of 1901 and other legislation on the subject raises a serious doubt as to whether any

citizenship whatever was conferred upon the Creek Indians at any time.

We shall not here repeat what was said on the former argument upon this point, except briefly to call the court's attention to the fact that this claim of citizenship grows out of the old general allotment act of February 8, 1887, as amended by the act of March 3, 1901 (24 Stat., 388, c. 119; 31 Stat., 1447, c. 868). This general allotment act provided that upon the completion of the allotments *under it*, and the patenting of the lands to the allottees, every member of the various tribes of Indians to whom allotments were made, *under that act*, should have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which he resided, and that every Indian born within the United States to whom allotments were made under that act, and every Indian so born who had taken up his residence separate and apart from his tribe and adopted the habits of civilized life, was declared to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizens.

But the Creeks obtained no citizenship under this act; first, because they took no lands under it; and second, because section 8 of the act expressly provided that it should not extend to the Creeks and certain other Indians. (24 Stat., 391.)

Now the amendment of March 3, 1901 (31 Stat., 1447, c. 868) simply added the words "and every Indian in Indian Territory" to the words already found in the act of February 8, 1887, to the effect that

every Indian born within the United States and who had taken up his residence separate and apart from the tribe and adopted the habits of civilized life, should become a citizen of the United States. But this amendment of March 3, 1901, did not repeal or modify section 8 of the act of February 8, 1887, which had expressly declared that its provisions should not apply to the Creeks and certain other tribes named.

Finally, the act of May 8, 1906 (34 Stat., 182, c. 2348) again amends the old allotment act of February 8, 1887, and in section 6 thereof expressly declares on the subject of citizenship "*that the provisions of this act shall not extend to any Indians in the Indian Territory.*" Thus it follows:

First. If Marchie Tiger was made a citizen of the United States by the amendment of March 3, 1901, he was not made subject to the laws of the State or Territory in which he resided and was not released from Federal jurisdiction, because he does not come within the terms of the first sentence of the general allotment act of February 8, 1887, which expressly created this status for the particular Indians there provided for.

Second. If he was made a citizen by the amendment of March 3, 1901, it must be despite the fact that section 8 of the allotment act of February 8, 1887, expressly declaring that the citizenship there conferred did not extend to the Creeks and other Indians was still unrepealed.

Third. If he became a citizen by the amendment of March 3, 1901, it appears clearly that Congress

did not so regard him, for by the act of May 8, 1906, which again amended the general allotment act of February 8, 1887, it was expressly provided that the citizenship conferred by the earlier statute *"shall not apply to any Indians in the Indian Territory,"* and it is inconceivable that Congress, having consciously granted citizenship to the Creeks in 1901, should deliberately withdraw the grant in 1906. Certainly Congress did not intend that they should be citizens for five years only.

Fourth. If he became a citizen under the act of March 3, 1901, it must have been because an exception was made for the special benefit of the Creeks and other Indians of the Indian Territory, for the general policy of Congress, as indicated in all other acts on the subject, has been not to confer citizenship upon any Indians so long as their tribal governments continue, and in no event until they have taken up civilized life apart from their tribes. In the case at bar when the act of March 3, 1901, was passed, the Creek tribal government was certainly in existence, Marchie Tiger was a member of the tribe, was living as such, and the allotted lands he inherited were not distributed in severalty for more than a year later.

From these considerations it would seem that the only way to harmonize the several conflicting provisions of the statutes with respect to citizenship, and especially with respect to citizenship for the Creeks, is to construe the amendment of March 3, 1901, as not intended to apply to the Creeks, but

only to such Indians in the Indian Territory not provided for in the original allotment act of February 8, 1887, and only to such of these as had taken up civilized life apart from their tribes.

This construction makes the several acts consistent not only with each other, but with the general policy of Congress.

B.

But assuming that citizenship was conferred upon the Creeks, it is clear that Congress has never surrendered its power to legislate for them and to supervise the disposition of their lands.

One of the important facts which appears in every aspect of this case is that the tribal government of the Creek Nation was in existence during all the negotiations between that tribe and the United States looking to the final allotment of their lands; was in existence when the so-called citizenship act of March 3, 1901, was passed; was in existence when the supplemental agreement of June 30, 1902, under which the allotments were made, was enacted by Congress and ratified by the tribal authorities; was in existence on April 26, 1906, when the act here complained of, restricting the alienation of the lands of full-bloods, was passed; was in existence when the plaintiff in error on August 8, 1907, undertook to convey his inherited lands without the approval of the Secretary of the Interior; *and is in existence to-day.*

It is true that the powers of this tribal government have been reduced from time to time, and it is true

that the powers now are very limited. But the point here made is that at the date it is claimed the Creek Indians were citizens of the United States, and when it is said Congress forever surrendered its right to legislate with respect to them as a special class, Congress was dealing with them as a tribe and submitting acts affecting them to the ratification of their tribal government; and, finally, that the very act by which the lands here involved came by inheritance into the possession of the plaintiff in error was ratified by the national council of his tribe more than a year after the date upon which it is now claimed he became a citizen of the United States, and free from all control by Congress over the disposition of his lands.

An examination of the several acts of Congress respecting the tribal government of the Creeks will establish the fact, beyond doubt, that during all the negotiations and legislation looking to the distribution in severalty of the Creek lands and the protection of those lands in the hands of the Indians, particularly full-blood allottees and full-blood heirs, Congress has maintained the existence of the Creek tribal government and still maintains it—a situation wholly inconsistent with the view that Congress has relinquished the right to supervise the alienation of their lands.

The first act which in any way materially diminished the full authority of the tribal governments of the five tribes was a temporary statute of June 7, 1897, which was almost immediately superseded

by the act of June 28, 1898 (30 Stat., 495, c. 517). This last act confirmed the Creek agreement with the Dawes Commission and while that agreement was never ratified, the provisions contained in the act are pertinent as evidencing the fact that Congress was dealing with the Creeks as a tribe.

The provisions of sections 26 and 28 of this act, abolishing tribal courts and prohibiting the enforcement of tribal laws by United States courts in the Indian Territory, were limited by, and subject to, special agreements contained in the same act. (In re Poff's Guardianship, 103 S. W. Ind. Ter., 765.) In fact, it seems almost certain that this provision was inserted for the sole purpose of inducing reluctant tribes to enter into the agreements then pending.

By paragraph 32 of section 30 of this act, the Creek tribal courts are continued, with limited jurisdiction.

By paragraph 33 it continued the Creek tribal council but prohibited the passage of certain laws without the approval of the President of the United States.

Paragraph 36 provided for the special protection of Creek Indians against the sale of intoxicating liquor.

Paragraph 37 provided that the Creeks shall become citizens of the United States upon the "abolishment of the tribal government."

Paragraph 38 continued in force existing treaties with the Creeks, so far as consistent with the agreement.

This agreement was not ratified by the Creeks for the reason that the full-bloods were incompetent to understand its provisions and were under the impression that their failure to ratify the proposed agreement would be a rejection of the entire act and would reestablish their tribal courts with their former powers undiminished.

Then came the original Creek allotment act of March 1, 1901 (31 Stat., c. 676). This was passed *two days before the so-called citizenship act of March 3, 1901*, and yet Congress provided for its ratification by the Creek tribe as a tribe, and it was ratified by the national council of that tribe on May 25, 1901, and proclaimed by the President on June 25, 1901 (32 Stat., part 2, 1971, 1972), more than three months after the date when it is now claimed the Creeks were made citizens of the United States.

Section 7 of this act of March 1, 1901, authorized the enforcement of the Creek laws of descent and distribution.

Section 40 provided for a school system conducted under Creek laws, subject to certain modifications, and authorized the Creek council to make appropriations for such school system.

Section 42 recognized the power of the Creek council to pass laws, with the approval of the President of the United States, and, in certain instances, permitted the passage of such laws without such approval.

Section 43 provided for the special protection of the Creeks against the sale of intoxicating liquors.

Section 44 continued in force the existing treaties with the Creeks except in so far as they were inconsistent with the new agreement.

Section 46 *continued the tribal government of the Creek Nation to March 4, 1906, "subject to such further legislation as Congress may deem proper."*

It thus appears that at the time the so-called citizenship act was passed there was pending between the United States and the Creek Nation an agreement providing for the continuance of the Creek tribe as a nation of Indians, and for the continued guardianship of the United States over them as a nation. It is inconceivable that Congress intended the general provisions in the so-called citizenship act to destroy a relationship between the United States and the Creek Indians, thus expressly continued by special acts relating to them, and whatever may be said as to the dissolution of those relations between the United States and the members of other tribes, it is clear with respect to the Creeks that the guardianship was intended to be maintained. Indeed, on the *very day* that Congress passed the so-called citizenship act it recognized the right of the Creek tribe to legislate for its own members, subject to the approval of the President of the United States. (Appropriation act of Mar. 3, 1901; 31 Stat., 1077.)

So far as the Creeks are concerned this is equivalent to an express declaration that nothing contained in the so-called citizenship act shall be construed to destroy the power of that tribe to legislate for its members.

C.

Since the passage of the so-called citizenship act the Creek Indians have consented to a continuance of their tribal government and a continuance of the supervision of the United States over the disposition of their lands.

On May 25, 1901, the national council of the Creek tribe ratified the original allotment act of March 1, 1901 (see President's proclamation, 32 Stat., part 2, 1971, 1972), and on July 23, 1902, the national council of the Creek tribe ratified the supplemental agreement of June 30, 1902 (see President's proclamation, 32 Stat., 2021).

On March 2, 1906, Congress passed a joint resolution continuing the tribal existence and tribal government of the Creeks, and that government is still in existence.

On April 26, 1906, Congress passed the act involved in the present controversy, continuing, with special reference to full-bloods, the restrictions as to alienation which had not yet expired.

On August 3, 1907, the Creek national council "adopted, ratified, and confirmed" sections 19, 22, and 23 of the act of April 26, 1906, and this act of the Creek council was approved by the President of the United States on September 17, 1907. (See previous pages 42, 43, 44, 45, and 46.)

It thus appears that every step taken by Congress with respect to the allotment of Creek lands, and the restrictions upon their alienation, whether in the hands of allottees or their heirs, has been

with the full approval of the Creek Nation acting through the authority of the tribal government.

The plaintiff in error obtained his lands through the medium of these acts of Congress and of the national council of his tribe.

When the original allotment act of June 30, 1902, was passed it was agreed between the Creek Nation and the United States that the tribal government should continue and should have power to adopt legislation with the approval of the President of the United States. The allotments were accepted subject to this provision. One of the acts passed by the Creek national council was that of August 3, 1907, adopting and ratifying the act of Congress of April 26, 1906, which forbade full-blood heirs to alienate their lands without the approval of the Secretary of the Interior.

Can a full-blood Creek now be heard to complain of this act? In the case at bar no Indian is complaining. Those only are concerned, in maintaining the right of the Indian as a citizen of the United States to sell his lands whenever he pleases, who are anxious to buy the lands without the scrutiny of any government authority.

D.

In the case at bar there is no conflict between State and Federal authority.

The defendants in error rely largely upon the Heff case (197 U. S., 488), in support of their claim that a grant of citizenship takes away from Congress the

power to legislate with respect to the Indian and his land. But the Heff case involved a conflict between State and national jurisdictions, and the Indian in that case had been given citizenship under the first sentence of the allotment act of February 8, 1887, which made the Indians subject to the laws, both civil and criminal, of the State or Territory in which they resided. Further than that, all tribal relations had ceased and the Indian was not on a reservation or on allotted land. Under these circumstances this court held that the crime of selling liquor to an Indian in the State of Kansas was not punishable under a Federal statute, but only under State laws.

In the Celestine case (215 U. S., 278), and the Sutton case (215 U. S., 291), which followed, Mr. Justice Brewer, who wrote the opinion in each of the three cases, clearly distinguishes the Heff case from those in which the Indian involved was a citizen of the United States but not subject to the laws of the State or Territory in which he resided.

It appears clear from these decisions—

First. That the grant of citizenship does not deprive Congress of its full power to legislate with respect both to the Indian and his lands unless they have been expressly subjected by Congress to State control.

Second. That the intention of Congress to withdraw Federal control over the Indian and his lands must be clearly expressed, and the courts will not assume it. This is explicitly stated in the Heff case.

Third. That there is a difference between political rights and property rights in so far as either may be

affected by the grant of citizenship and property rights may be controlled by Congress even though political rights are granted.

In *United States* v. *Rickert* (188 U. S., 432) all these questions were carefully examined. It was held that a mere grant of Federal citizenship to Indians does not prevent them from continuing to be wards of the United States, and, finally, that the State of South Dakota could not tax the allotted lands of individual Indians even though they had become citizens of the United States, because Congress had not released its control over such lands.

In the case at bar there can be no conflict between National and State authority for the further reason that the act of April 26, 1906, was passed, and the attempted conveyance in violation of its terms took place before Oklahoma became a State. More than this, Congress, in the act enabling Oklahoma to enter the Union, expressly provided that—

> Nothing contained in the State constitution shall be construed to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians [that is, Indians within the Indian and Oklahoma Territories], their lands, properties, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed. (Act of June 16, 1906, 34 Stat., c. 3335.)

The constitution of Oklahoma ratified and consented to this provision. (Section 497, Bun's Const. of the State of Oklahoma, p. 137.)

E.

This court and the lower Federal courts have repeatedly recognized the right of the United States to contiuue its guardianship over Indians who have been made citizens of the United States.

In addition to the cases already cited, we call the court's attention to the recent decision of Judge Amidon in *United States* v. *Allen* (179 Fed., 13, 17, 19), where there was under consideration questions practically identical with those involved in the case at bar, and where, after an exhaustive review of the leading cases of this court, the conclusion was reached that the so-called citizenship conferred upon the members of the five tribes by the act of March 3, 1901, did not destroy the guardianship of the United States over the members of such tribes.

Judge Amidon says:

> Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the Government for the period of twenty-five years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the Government for the industrial betterment of the

Indian from being defeated by the alienation of the property. The right of the Government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887 is fully sustained in *United States* v. *Rickert* (188 U. S., 432). It is contended, however, in the present case, that that decision is not controlling, because there the Government held the legal title to the property for a period of twenty-five years in trust for the Indian, whereas here the legal title has been conveyed to the Indian, but subject to a restraint upon alienation. *The decision in the Rickert case does not rest upon a principle of the law of real property, but upon the power of the nation to enforce its own measures.* [Our italics.]

Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case (197 U. S., 488; 25 Sup. Ct., 506; 49 L. ed., 848). That decision, however, as now explained by the Supreme Court in *United States* v. *Celestine* (215 U. S., 278; 30 Sup. Ct., 93; 54 L. ed., ——), lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit

of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the State, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the Five Civilized Nations Congress has been at great pains to indicate a different purpose. Here it has from time to time, down to the organic act admitting Oklahoma and the provisions which it insisted should be embodied in the constitution of that State, reserved to itself express authority to pass such laws with respect both to the Indians and their lands as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this: In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the State. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments.

> It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. (See, also, *U. S.* v. *Sutton*, 215 U. S., 291; 30 Sup. Ct., 116; 54 L. ed., ——.)

In *Wiggan* v. *Conolly* (163 U. S., 56, 57) the facts are that a treaty of July 28, 1862, provided that the members of a certain tribe of Indians five years from the date of the treaty should become citizens of the United States and subject to the laws of the United States and of the State wherein they might reside, and further provided that patents should issue to the members of the tribe. On or before March 30, 1906, a patent was issued to Esther Wilson, a girl under 21 years of age, wherein it was provided that she should not alienate or encumber the land until she became by the terms of the treaty a citizen of the United States. On February 23, 1867, an agreement was reached between the Indian tribe and certain commissioners on the part of the United States providing for important modifications of the provisions of the treaty, but this was not ratified by the Senate until June 18, 1868, and then with amendments in such important respects as to require subsequent ratification by the tribe. The treaty was not proclaimed until October 14, 1868 (15 Stat., 513).

Nevertheless, this court held that Esther Wilson's status as a citizen of the United States was altered by virtue of the tentative agreement between the tribe to which she belonged and the commissioners, subsequently ratified by the principals, and that her

property could not be disposed of except in accordance with the terms of the later treaty, even though the disposition attempted was made under the direction of the court of the State in which the land was situated.

To the same effect see *United States* v. *Flournoy, etc., Co.* (69 Fed., 891), *Hitchcock* v. *United States ex rel. Bigboy* (22 App. D. C., 275), *Ross* v. *Eells* (56 Fed., 855).

F.

No case in this court has ever denied the power of Congress to restrict the alienation of property while still in the hands of Indians.

There is nothing in the case of *Schrimpscher* v. *Stockton* (183 U. S., 290, 299), which, in the slightest way intimates that Congress has not the power to regulate the sale of Indian lands so long as they are in the hands of the Indians themselves. The case merely reaffirms the principle settled by the *Meehan case* (175 U. S., 1), to wit, that in the absence of a provision to the contrary an Indian may sell the land granted to him by the United States (or anybody else, for that matter), and that if the rights of third parties have not intervened the action of the Indian, under the power conferred upon him as to the disposition of his lands, is binding on all.

At no time has the Government contended that Congress has any power to set aside conveyances to third parties made by Indians under grants which contain no restrictions against alienation or under

grants whose restrictions have expired before conveyance, at a time when they were not forbidden by law to dispose of their lands. But this obviously has nothing to do with the question of whether Congress may adopt a policy prohibiting Indians from disposing of their property even after restrictions have been removed. Still less does it have anything to do with the power of Congress, while restrictions against the alienation are still in effect, to extend those restrictions.

G.

Without respect to citizenship Congress had full power to impose restrictions upon the alienation of land by full-blood Indians, as a class of incompetents.

Counsel for defendants in error unduly emphasize the importance of citizenship. Their contention seems to be that when one becomes a citizen of the United States he acquires some constitutional right to be treated like all other citizens. But this claim contains more sound than substance. Minors and lunatics may be citizens and yet their property rights may be restricted.

In *United States* against *Flournoy, etc., Co.* (69 Fed., 891) the same claim was made which is presented in the case at bar and it was asserted that since the Indian in that case had become a citizen of the United States there could be no prohibition upon the alienation of his land, but the Court said:

> The right to alienate lands is denied to minors, and yet during their minority they

> may be citizens of the United States with all the privileges and rights conferred thereby.

In *Rice* v. *Parkman* (16 Mass., 326) it was held that, notwithstanding the existence of a general statute granting to the courts authority to order the sale of the lands of minors, the State legislature had power to pass a special statute regulating the sale of the lands of certain minors. The validity of the statute being challenged, it was upheld, and the court said:

> This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

The power of Congress over incompetents dwelling within a Territory equals or exceeds that of a State over incompetents dwelling within the State.

Mormon Church v. *United States*, 136 U. S., 1, 42.

Shively v. *Bowlby*, 152 U. S., 1, 48.

It is entirely within the discretion of the legislative authority to determine whether it shall legislate with reference to persons constituting an incompetent class, as a class or as individuals, and the existence of competent persons within an incompetent class does not affect the validity of such legislation. (*Muller* v. *Oregon*, 208 U. S., 412, 422.)

In the present instance the legislation of April 26, 1906, imposing restrictions upon the power of full-blood Indians to alienate their lands was passed *and the attempted conveyance made* while Oklahoma

was a Territory, and Oklahoma as a State expressly consented to the maintenance of Federal laws over the Indians and their lands.

That full-blood Creeks are, as a class, incompetent must be assumed from the legislation of Congress with respect to them.

In the cases of *Muskrat and Dick* v. *United States*, No. 330, and *Brown and Gritts* v. *The United States*, No. 331, of the present term, the Court of Claims had occasion to examine the competency of full-blood Cherokees to protect themselves in the sale of their lands, and expressly found that as a class they are uneducated, unable to speak the English language, and without governmental supervision, are incompetent to guard their interests from designing persons who are constantly attempting to induce them to part with their property at grossly inadequate compensation.

CONCLUSION.

It is the duty of counsel for the Government to call the court's attention to the serious consequences that would follow a declaration that the allotted or inherited lands of full-blood Indians in Oklahoma may be conveyed without any governmental supervision. The result would be to make these incompetent Indians the prey of land speculators and to destroy the sovereign guardianship which Congress has exercised for more than a hundred years.

There are now pending many suits brought by the United States to cancel conveyances made in viola-

tion of the act of April 26, 1906, and more than 25,000 transactions of this character await the determination of the present case, and of several other cases involving substantially the same questions, which have already reached this court. Both the Government of the United States and the national councils of the several tribes desire to protect these full-blood Indians from their own incompetence. They assume this to be an obligation not alone to the Indian himself, but one arising out of grave considerations of the public welfare, for if the Indians are despoiled of their lands or part with them for an inadequate compensation the hope that they may develop into self-supporting and independent members of the communities in which they live will be destroyed, and they will become vagrants and wanderers, dependent upon the bounty of the United States or of the States in which they reside and threatening the good order of society.

Respectfully submitted.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney General.

FEBRUARY, 1911.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 60.

MARCHIE TIGER, PLAINTIFF IN ERROR,

vs.

THE WESTERN INVESTMENT COMPANY, ELLIS H. HAMMETT, R. C. ALLEN, AND J. C. PINSON, CO-PARTNERS UNDER THE FIRM NAME OF THE COWETA REALTY COMPANY, DEFENDANTS IN ERROR.

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANTS IN ERROR.

May it please the court:

In addition to what has been said in the original brief for defendants in error we desire to call the court's attention to the following:

First. Section 23 of the act of Congress approved April 26, 1906, relied upon by counsel for plaintiff in error, and the Government as indicating a general disability of full-

blood Indians, without regard to whether the land was allotted or inherited from an allottee, we direct the attention of the court to the fact that the limitation with regard to devising pertains to "real estate." In other words, a full-blood cannot disinherit by will the parent, wife, spouse, or child, with respect to any of his "real estate." "Real estate" means just what it says, and therefore covers and includes town property, or any other kind of real property, without regard to the source from which it was derived. This further illustrates the great length to which Congress undertook to go in attempting to control the property of full-blood Indians. While the right to make a will is neither a constitutional nor natural right, the limitation on the power to dispose of real estate by will affects all the land of the full-blood Indians no matter from what source it comes.

Second. Counsel for the plaintiff in error argues that section 9 of the act of Congress approved May 27, 1908 (35 Stats. L., 312), in imposing restrictions on the alienation of inherited lands of full-bloods shows a legislative construction of the prior law. They insist that Congress would not have undertaken to restrict the sale of inherited lands of full-bloods by section 9 of said act of 1908, unless such restrictions already existed. The other section relied upon contradicts this argument. The last sentence in section 9 extends the provisions of section 23 of the act of April 26, 1906, to wills executed by members of the Five Civilized Tribes of one-half or more Indian blood, when such citizen of one-half or more Indian blood disposes of his homestead by will. In other words, no full-blood Indian, under section 23, of the act of April 26, 1906, could disinherit by will the wife, spouse, parent, or child, unless such will was acknowledged before and approved by a United States Commissioner or a judge of the United States court. Section 23 of said act was confined to full-bloods, and no contention can be made that any limitation was imposed on mixed-bloods

by the act of 1906, with respect to disposing of their lands by will to whomsoever they saw proper, when such will was made after the restrictions expired under the provisions of the respective treaties made with the different tribes. Therefore, it was necessary to resort to the treaties to ascertain when restrictions expired on mixed-bloods, and showing that the act of 1906 did not undertake to restrict all the laws for all the tribes.

The first time any limitation was imposed requiring mixed-bloods of one-half or more degree of blood to obtain the approval of the United States Commissioner or judge to their wills disinheriting their natural heirs, is found in the last sentence of section 9 of the act of 1908. We presume, therefore, the Government would argue that the court should infer that the same limitation already existed on mixed-bloods, or otherwise Congress would not have imposed this limitation on mixed-bloods with respect to wills in the last sentence in section 9 of the act of 1908.

Third. We also direct the court's attention to the last sentence in section 19 of the act of 1906, wherein it is provided that "all lands from which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." This proviso was contained in section 19 when it passed the House in the form the bill reached the Senate.

It, therefore, appears that Congress had in mind the protection of the allottee with respect to his individual allotment, and not with respect to land inherited by him. Under this proviso inherited land would be taxable when statehood intervenes. Statehood was then not only in contemplation of Congress, but was under actual consideration, and was passed and approved by the President in less than sixty days after the act of 1906 under discussion.

Congress had in mind the fact that the new State could

not exist and maintain a government without the power of taxation. Lands restricted and in the name of the allottee as his individual allotment were protected from taxation. No protection against taxation was intended with respect to inherited lands, except where the inherited lands were inalienable under the treaties. This proviso in section 19 declares, "that all lands upon which restrictions are removed shall be subject to taxation, and the other lands (without regard to the degree of blood of the citizen), shall be exempt from taxation as long as the title remains in the original allottee." It, therefore, necessarily results that resort must be had to the respective treaties or agreements with the tribes to ascertain what lands were unrestricted. In other words, a mixed-blood allottee in the Creek Nation remained under restrictions until August 7, 1907, and his allotment would not be subject to taxation prior to that date unless he died and the same passed to his heirs by inheritance. In the Seminole Nation the allotment of the mixed-blood would not be subject to taxation until the patent issued. To ascertain when lands become subject to taxation in the Cherokee Nation would require a resort to the Cherokee agreement of 1902. We mean the allotments of mixed-bloods.

Fourth. We contend that section 22 of the act of April 26, 1906, is in its entirety an enabling act or provision. The Seminole treaty approved by act of Congress of July 1, 1908 (30 Stat. L., 567), declares, "all contracts for sale, disposal or incumbrance of any part of any allotment made prior to date of patent shall be void." No provision is made for sale with the approval of the Secretary. There is no provision for alienation of allotted or inherited lands in the supplemental Choctaw and Chickasaw supplemental agreements (32 Stat. L., 641), with approval of the Secretary of the Interior. Neither sections 14 nor 15, of the Cherokee Agreement (32 Stats. L., 716), provide for alienation of either the allotment or inherited lands with consent of the Secretary

of the Interior. Section 16 of the supplemental Creek agreement, set out in our original brief in full on page 15, provides for alienation by the allottee or his heirs with the approval of the Secretary of the Interior. The Secretary of the Interior, therefore, had no authority to consent to the alienation of inherited lands under any of the treaties, except under the agreement made with the Creeks. We, therefore, contend that the proviso, that is, the last sentence in section 22, operated exclusively in those tribes where the Secretary did not before have jurisdiction to consent to the alienation of inherited lands, and in so far as the Creek Nation is concerned is a mere re-enactment of the provisions of section 16 of the supplemental Creek Agreement.

If section 22 had therefore provided "that the adult heirs of deceased Indians *except full-blood heirs* of either of the Five Civilized Tribes * * * may sell and convey lands inherited, etc.," the full-blood heirs in the Cherokee Nation, and the Seminole Nation would have remained powerless to convey without approval of the Secretary. It was, therefore, the purpose of Congress to enable full-blood heirs in all the tribes to sell during the term of the limitations and restrictions imposed by the treaties; provided, during the term of the treaty restrictions, they obtained the Secretary's approval. If the Government's construction is sound then full-blood heirs are denied the power to alienate their inherited lands for all times to come, whereas, such full-blood could alienate their individual allotments at the end of twenty-five years.

Tribal Government.

Fifth. Much stress is placed by counsel for the United States upon the existence of a tribal government. The last act on this subject is section 28 of the act of April 26, 1906. It might be well to consider what precedes this section in this same act and which is pertinent to this question.

It remains for the National Attorney of the Cherokee Nation, Mr. W. W. Hastings, to intervene on the theory that he is the representative of the Cherokee people.

This harmless illusion is doubtless due to the appointment of Mr. Hastings by the Secretary of the Interior to assist in perfecting the Cherokee rolls. He must look for his employment and his compensation to the Secretary, and it is but natural he should espouse the cause of the Secretary in the assertion of guardianship.

The Cherokee tribal government was destroyed on June 28, 1898, by the Curtis Act.

This act by section 28 provided that all tribal courts in Indian Territory should be abolished and that the United States court should thereafter exercise exclusive civil and criminal jurisdiction in the Cherokee Nation. Section 26 provided that the Cherokee law should not be enforced at law or in equity in the courts of the United States. Section 19 provided that no further payments should be made to tribal officers. Section 16 provided that it should be unlawful for any person after the passage of the act to receive any royalty or rents on any lands or property belonging to any of the tribes.

By this act the Dawes commission was authorized to make up the rolls of the members of the Cherokee tribe and allot the surface of the lands.

After the expiration of the terms of office for which the principal chief and Cherokee Council had been elected their terms of office became vacant. The principal chief had been elected in August, 1895, and the council in August, 1897, and their terms of office expired in November, 1899, and there was no subsequent lawful election for the reason that the tribal government had terminated by the act of June 28, 1898.

Under this condition of affairs one Cherokee might assault, rob or kill another without being subject to punishment under the tribal law. There was no tribal law because

there was no possibility of enforcing the tribal law which previously existed.

When Congress passed the act of July 1, 1902, ratified by the Cherokee people, it was provided, however, that the "National Council" might elect a school board and appropriate school moneys subject to approval, but this power was terminated by section 10 of the act of April 26, 1906.

The so-called "principal chief of the Cherokee Nation," who was nominally recognized, was authorized by section 39 to appoint an appraiser for town-site improvements, a right subsequently taken from him by the act of April 26, 1906, and it was provided by section 54 of the act of 1902 that if the chief executive of the Cherokee Nation failed to appoint a town-site commissioner the Secretary of the Interior might appoint him. It was provided by this agreement, section 58, that the principal chief should execute and deliver patents to Cherokee citizens entitled thereto, the Secretary of the Interior furnishing the blank patents necessary, but it was also provided by the act of April 26, 1906, that if the "principal chief" failed to properly perform this duty the Secretary of the Interior might name some other citizen of the Cherokee Nation to perform this duty.

The "principal chief" was authorized to employ attorneys under section 68 to bring suit against the United States for any claim which the Cherokee tribe had against the United States. This duty was performed immediately thereafter and the authority of the "principal chief" exhausted

The "principal chief" was authorized by section 29 of this act tc receive one of the quadruplicate copies of the complete rolls of citizenship of the Cherokee Nation. This function was exhausted in 1907.

By section 75 of this act the "principal chief" was authorized to call an election for the ratification of the act, and it was provided that the votes should be counted by the Cherokee National Council in the presence of a member of the commission to the Five Civilized Tribes and the said

member and the "principal chief" shall jointly make certificate thereto.

These duties were performed and exhausted in August, 1902.

Every function therefore of the National Council and of the principal chief has been long since exhausted except the mere delivery of the patent, and this duty could be discharged by any other citizen of the Cherokee Nation who might be appointed by the Secretary of the Interior.

The delivery of the patent itself is immaterial under section 21 of the act of July 1, 1902, which declares that the allotment certificate shall be conclusive evidence of the right of the allottee to his allotment.

It therefore is obvious that Mr. Hastings, being appointed by the so-called principal chief, has no commission from the Cherokee people to act for them. The Cherokee people have not authorized the principal chief to perform any function not heretofore completed except the delivery of patents. He is not authorized as chief executive to execute any law, for there are no laws to execute.

He is not authorized by the Cherokee people to appoint any attorney.

The Cherokee National Council, so called. had no authority from the Cherokee people to appoint any attorney or to authorize the principal chief to appoint any attorney, to represent to this court that the Cherokee people desire this legislation.

The Secretary of the Interior would be justified in appointing attorneys necessary to the discharge of the duty of the United States to complete the rolls and to arrange the distribution of the property of the Cherokees which the United States agreed to distribute by the act of July 1, 1902, and no objection is suggested to the employment of Mr. Hastings by the Secretary of the Interior for those purposes.

The objection is that Mr. Hastings without legal au-

thority from the Cherokee people undertakes to speak for 37,000 people who have given him no commission to speak for them.

Mr. Hastings justifies his intervening petition on the ground that W. C. Rogers, the acting principal chief of the Cherokee Nation, had employed him as provided under section 28 of the act of April 26, 1906 (30 Stat., 137); that he was employed on March 29, 1907, his service expiring March 4, 1908, and that he was employed to represent the Cherokee Nation in all cases in which it is interested before the Court of Claims.

Muskrat and Dick *vs.* U. S., Record, p. 17.

The act of April 26, 1906, section 28, provided as follows:

(34 Stats., 148:)

> "That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof shall be of any validity until approved by the President of the United States, and that no act, ordinance or legislation (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States."

There was no one authorized by the Cherokee people to act for them, and this act of Congress gave no authority to the Cherokee legislature and could give none without the consent and authority of the Cherokee people themselves, who had previously to this time consented to the dissolution of that tribe and of their tribal government by the act of July 1, 1902, ratified by the Cherokees August 7, 1902.

The record shows nothing justifying Mr. Hastings in presuming to represent the Cherokee people beyond his own claim thus set up in his intervening petition. The Court

of Claims finds no fact holding him to be a representative of the Cherokee people or authorized to speak for them in this matter, and the statutes of the United States of which the court must take cognizance show that the Cherokee people have given no such authority and could give none after the dissolution of their tribal government and the termination of their tribal existence, except for the bare purpose of distributing the remaining property held by them in common.

The delegation of authority to tribal officers by the tribes, generally speaking, ceased March, 1906. The continuance of these tribal officers in office by act of Congress did not confer upon them any authority to act for or bind the members of the tribe in any matter after March, 1906. Indeed it is not claimed that the Choctaws and Chickasaws ever consented in any manner or form to any of the acts extending restriction upon alienation.

Sixth. It was stated in oral argument by counsel for the United States that there was sustained in the case of Smith *vs.* Stevens (10th Wallace) frequent restriction of alienation imposed thirty-five years after the vesting of title. No such question was involved. The only question involved was whether the repeal of an act prohibiting alienation operated to make a conveyance made in violation of such act.

Act of May 8, 1906.

Seventh. It was stated in oral argument by counsel for the United States that Congress expressly undertook to repeal citizenship conferred upon the Indians in the Indian Territory by the act of May 8, 1906 (34 Stats., 182). This is clearly in error because they are especially excepted from the provisions of said amendment and this, as is clear from the discussion had at the time of the adoption of the act, was done upon the ground that they were citizens of the United States with all the rights, privileges, and immunities

of such and that citizenship is a vested right (see Appendix B, brief filed *amicus curiæ* by S. T. Bledsoe and Evans Browne in case No. 331).

Eighth. The act of May 27, 1908, is not a legislative declaration of the meaning of the act of April 26, 1906, nor does it purport to be such. It is a revision of the provisions of said act, omitting many therefrom, covering the entire subject of restrictions upon alienation, but with provisions varying very much from those contained in the act of April 26, 1906.

Ninth. As construed by the counsel for the United States, section 22 of the act of April 26, 1906, is much more vicious than section 19. It imposes in perpetuity restrictions upon the alienation of allotted lands held absolutely free from all restrictions with the unconditional right to alienate. It converts an unrestricted fee-simple estate into a conditional and restricted life estate. It grants as the sole substitute for free alienation the right to ask the Secretary's permission to alienate. This permission the Secretary may withhold or give either with or without consent.

Tenth. This court said in Garfield *vs.* Goldsby (211 U. S., 249-262): "There is no place nor constitutional system for the exercise of arbitrary power. * * *" It also further said the right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say its binding obligation has never been questioned in this court. It should be remembered that this court was at that time speaking with reference to the rights of a former member of the Five Civilized Tribes in relation to his citizenship and the lands selected by him in allotment.

Eleventh. It was stated by Mr. Hastings in oral argument that if the act of April 26, 1906, in so far as it imposes restrictions upon alienation, is held invalid that in a very short time no full blood Indians will have enough land left on which to be buried. This statement is much in error. Every full-blood Indian affected by said act has had allotted to him a homestead sufficient for his support, which under the terms of each allotment agreement remains inalienable and non-taxable for life (sometimes not exceeding 21 years), without regard to the provisions of the act of April 26, 1906.

It has developed from the oral argument that in the limited time at the disposal of the court to assign to each [illegible] argument, that counsel did not, and could not, in the nature of things, make plain certain conditions that obtain with respect to the land tenures of these Five Civilized Tribes.

Scheme of Allotment.

The general plan or scheme of distribution of the landed estates of these civilized tribes was, in the main, the same in all of them, but differed in some particulars among each. We shall here confine ourselves to the Choctaws and Chickasaws, as this jurisdictional act of Congress indirectly raises the validity and constitutionality of all the acts of Congress as applied to all of the five tribes alike.

There is no difference between the Choctaw and Chickasaw tribes except a political one. They have a common language, and own jointly in round numbers ten millions of acres of land. A Choctaw may go into the Chickasaw country and take his allotment and, vice versa, a Chickasaw may go into the Choctaw country and take his allotment. The rolls of the two tribes as compiled show that there are about three times more Choctaws than Chickasaws; hence many Choctaws have gone over into the Chickasaw Nation and taken their allotments.

The agreements of date of September 25, 1898, and July 1, 1902, made with these tribes and the Federal Government provided that their landed estates should be parceled out or "allotted" among the several members thereof at the expense of the United States Government. Under the direction of the United States Geological Survey, the lands were first surveyed, being divided into sections of six hundred and forty acres each, then further subdivided into quarter sections of one hundred and sixty acres each, and still further subdivided into quarter of quarter sections so as to make forty-acre tracts or subdivisions.

Each forty-acre tract was then inspected by a committee consisting of three members, one appointed by the General Government, one by the Choctaw tribe and one by the Chickasaw tribe. Each forty-acre tract was given as one of a class falling under the following heading (see reports of Commission to the Five Civilized Tribes to the Secretary of the Interior):

1. Prairie bottom land.
2. Timbered bottom land.
3. Black prairie land.
4. Bottom land subject to overflow and good prairie land other than black.
5. Bottom land profitably drainable and level tillable prairie land.
6. Rolling prairie land and level tillable upland with timber thereon.
7. Rocky prairie land.
8. Alkali land, bottom land not profitably drainable; and mountain pasture land.
9. Sandy lands with pine timber thereon, the pine timber appraised separately.
10. Rough mountain land.

Actual mathematical computation, of course, disclosed a certain number of acres of each of the above ten classes, all of the land not being of one class.

Now, the above committee placed a money value on each forty-acre tract as it appeared under the respective classification.

These money values are as follows:

1. $6.50 an acre.
2. $6.50 an acre.
3. $6.50 an acre.
4. $6.00 and $5.50 an acre.
5. $5.00 an acre.
6. $4.00 and $3.25 an acre.
7. $3.00 an acre.
8. $1.50 and $1.00 an acre.
9. $.75 an acre.
10. $.25 an acre.

By multiplying the above appraisement by the number of acres of land under each of the above ten classifications, the money value of the entire surface area of the Choctaw-Chickasaw countries was reached in so far as it related to that portion susceptible of allotment and in so far its value was necessary to arrive at a general basis. This total value as determined by this method was divided by the number on the roll, or list of membership of the tribes, and it was found that each man, woman, and child may have out of the tribal landed estate belonging to the whole Choctaw-Chickasaw people $1,041.28 in land, or three hundred and twenty acres of the average allotable land.

Now, in order that this sum may be reached in land so nearly as may be, under the agreement of allotment, the forty-acre tracts were further subdivided into ten-acre tracts (and under a subsequent ruling of the Secretary of the Interior were further subdivided into five-acre tracts).

Now, any member of the tribe may take his allotment anywhere he pleased, near his home or two hundred and fifty miles away from his home, as it suited his judgment and convenience. He may take his allotment in that grade of land appraised at $6.50 an acre and classified as "Prairie

bottom land," or he may take it the tenth grade land appraised at twenty-five cents, or in any or all of the intermediate grades mentioned. The records of the Commissioner to the Five Civilized Tribes disclose that many allottees took their allotments in as many as ten different tracts, representing almost ten different grades and money values and as far apart respecting their tracts as fifty miles. That is to say that a member of the tribe would take forty acres of timberel upland, appraised at $3.25 an acre at his home, and then go fifty miles from there and take ten acres of bottom land appraised at $6.50 an acre, and then go forty miles in an opposite direction and take ten acres of mountain land at $1.00 an acre.

Now, each of these allotments of $1,041.28 worth of land was divided into two parts, equal so far as maybe in money value, one of these parts amounting to $520.00, in round numbers, was called the homestead and the other half called lands exclusive of the homestead, or in shorter and more common language, the "surplus." That is to say, taking the average allotment of 320 acres, 160 acres is the "homestead" and 160 acres the "surplus." Separate patents are issued to each of these different tracts. Now, as a matter of fact, as the records of the Government disclose, the Choctaw Nation is for the most part timbered, rough, uneven land, while the Chickasaw country is of a superior grade; the Choctaws living in the Choctaw Nation, thousands in number, took their homestead allotment in the Choctaw country at and near their homes and took their "surplus" allotment of 160 acres frequently two hundred and fifty miles away from their homestead in the Chickasaw country.

It will be seen from the foregoing that if an average family of five took average land in allotment, they would have in the aggregate sixteen hundred acres of land, and if they took the tenth-grade land, they would have twenty-one thousand acres. Each man, woman, and child, it will be

remembered, is entitled to an allotment of three hundred and twenty acres of the average allotable land.

In these allotment agreements referred to Congress and the Indians themselves, knowing that they had no desire to become land barons, and knowing that they would, in many instances, take their surplus allotment scores of miles away from where they resided, and further knowing that they could not possibly cultivate and till all of this land of sixteen hundred acres to each average family, very wisely provided:

1. That a separate patent should issue to the homestead and to provide for him a home it should not be subject to sale for twenty-one years and should not be subject to lease for longer than five years at a time.

2. That the surplus lands may be sold one-fourth after one year, one-fourth in three years, and the remainder in five years from the date of the patent; that it should not be sold for less than its appraised value aforesaid.

The allotment agreement between these tribes and the Federal Government, in which the above allotment plan or scheme is mapped out, bears date of September 1, 1902. The records of the Government disclose that under this agreement, the land offices opened for the reception of allotments in the Choctaw-Chickasaw countries on April 14, 1903. Thousands of patents to this land commenced to be issued in 1904 and in 1905, by which time most of the patents were executed by the chief of the Choctaw tribe, the governor of the Chickasaw tribe, approved by the Secretary of the Interior and delivered to the respective allottees then enrolled.

Section nineteen of the act of nineteen hundred and six, and known as the McCumber amendment, and being the act of which we complain, modifies the sixteenth section of the allotment agreement of 1902, whereby the allottee may sell one-fourth of his "surplus" of one hundred and sixty acres in one year, being forty acres; one-fourth in three years, being another forty acres, and the remainder in five

years, being eighty acres; leaving as his homestead still for himself and each member of his family, another one hundred and sixty acres, and in an average family of five, eight hundred acres, for him to live upon and develop, and which cannot be sold or encumbered for twenty-one years. We respectfully insist that the following considerations are due this subject to determine whether or not it is right and proper for Congress to have enacted the statute extending these restrictions (being the McCumber amendment, section 19, act of April 26, 1906):

First. It is not right for the reason that the Indians who own the land themselves did not agree to it.

Second. It is not right for the reason that the Indians in a solemn agreement with the Government agreed in consideration of the dissolution of their much cherished tribal governments and becoming a member of the white race in law, that they should be permitted to do certain things, and one of these was to sell one-fourth of his surplus within a certain time. It would be breaking faith with the Indian, so they say, to do this.

Third. Congress has no more jurisdiction or authority over these "Indians" and their lands than it has over any other citizen of this Republic. It has no jurisdiction over their person more than any other citizen, because they are citizens of the United States. It has no greater authority over their lands than any other citizen, because since 1830 they have owned the lands in fee simple, and in 1905, long prior to the passage of the act of Congress extending restrictions and being the act complained of, patents had been *issued and delivered to the allottee;* thus the Government lost control and exercise over them.

Fourth. It is impracticable and unwise. The special Senate committee by going on the ground and devoting much time and attention thereto, so reported to the Senate. That is a new country. It needs development. If it is to prosper in an agricultural sense the lands must be cleared

of timber, fenced and placed in cultivation. No family of five can or will cultivate sixteen hundred acres of land. He should be permitted, as was wisely provided in the allotment act, to sell a portion of his land called the surplus in order to take the proceeds of such sale and develop his homestead of one hundred and sixty acres, and upon which he lives. This 160 acres is reserved to him beyond doubt for twenty-one years so that the statement made by Mr. Hastings in his oral argument "that he would not have enough land upon which to be buried" is not in sense true. Each family of five would have 800 acres, and if they took in allotment the tenth-grade land would have ten thousand acres upon which to live "and be buried." As long as the land remains in the hands of the original allottee and is unrestricted it is not taxable. And since we are speaking as if statehood had not come, it is necessary in order to support the coming State government something must be subject to taxation. By the enabling act these Indians are to enjoy all of the protection afforded by the State government, and they should be made to bear some of its burdens. It is not the purpose of the American people to build up a landed aristocracy, where one-tenth of the people own all the land, and yet this very one-tenth, though receiving all the protection and enjoying all of the benefits, bears little or no burden thereof. The Indians themselves do not want it this way; their white United States citizens living with them do not want it. It is undemocratic and unwarranted.

In this connection permit us to say that if it long continues that a landed few, such as these red United States citizens are, own all the land and bear none of the burdens of government, the white United States citizen neighbor, who has to bear necessarily excessive taxation on his town property and personal property, since he owns none of the land, having to pay all of the taxes to support the Government of the State that is to be, that after a while he will become

restless and cry out in no uncertain manner against this marked and uncalled-for exhibition of favoritism.

Fifth. The Indian should be permitted to sell his "surplus" lands untrammeled by the Department of the Interior. These Indians are called by the Government the "Five *Civilized* Tribes," to distinguish them in intelligence and ways of the white man from the nomadic tribes of Indians. It is a matter of common knowledge that this race of people has among them some of the shrewdest men, whose opinions are entitled to and do command respect. The allotment agreement provides that the lands shall not be sold for less than their Government-appraised value as outlined above.

Therefore, we see that from a standpoint of morals and from public expediency it is not only wise but almost imperative that something be done in this coming new State to clarify the situation. The Indian of the Five Tribes should be permitted to work out his own destiny, for by that means and that means alone will he ever become an independent, industrious citizen of the coming new State and of this Republic.

In view of the fact that the Government is urging that the question involved in the Gritz-Brown case is a moot one (but not assenting thereto in the least) we desire to call the court's attention to the brief filed *amicus curiæ* in said case by S. T. Bledsoe and Evans Browne. It presents our views as to many of the questions here involved, which were not presented more fully in the brief filed in this cause because it was assumed that the Gritz-Brown case would be determined upon its merit and that the United States, while claiming to act as the guardian of the former members of the Five Civilized Tribes, would be anxious to have all controversies there involved settled.

Respectfully submitted,

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Office Supreme Court U. S.
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In the Supreme Court of the United States.

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~~NUMBER 316, OCTOBER TERM, 1908.~~

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VS.

THE WESTERN INVESTMENT COMPANY, ELLIS H. HAMMETT, R. C. ALLEN AND J. C. PINSON, CO-PARTNERS UNDER THE FIRM NAME OF THE COWETA REALTY COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR.

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In the Supreme Court of the United States.

NUMBER 515, OCTOBER TERM, 1908.

NUMBER 242, OCTOBER TERM, 1909.

MARCHIE TIGER, PLAINTIFF IN ERROR,

VS.

THE WESTERN INVESTMENT COMPANY, ELLIS H. HAMMETT, R. C. ALLEN AND J. C. PINSON, CO-PARTNERS UNDER THE FIRM NAME OF THE COWETA REALTY COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR.

May It Please the Honorable Court:

This suit was brought in the United States Court for the Western District of the Indian Territory by the plaintiff in error to remove an alleged cloud on the title to certain real estate. The plaintiff in error, Marchie Tiger, is enrolled as a full blood Creek Indian, and is the sole heir at law of his deceased relatives, Sam Tiger, Martha Tiger, Lydia Tiger and Louisa Tiger, all of whom are enrolled as full blood Creek Indian citizens, and all of whom died intestate, and without issue, during the year 1903, after having received title through

patents to their respective allotments of land in the Creek Nation, consisting of 160 acres each. These allotments inherited by Marchie Tiger and by him conveyed to the plaintiffs in error, make up the lands in controversy in this suit.

Marchie Tiger conveyed the lands inherited by him from Sam Tiger and Martha Tiger to the plaintiffs in error, The Western Investment Company, on August 8th, 1907; he conveyed the lands inherited by him from Lydia and Louisa Tiger to the plaintiff in error, The Coweta Realty Company, by deed bearing date of August 13, 1907.

Marchie Tiger filed this suit in the lower court against the Western Investment Company and the Coweta Realty Company, praying that all the deeds executed and delivered by him to them be canceled; that said sales be set aside, and that the court decree that the attempted sales of said lands were null and void; that the conveyances thereof, as clouds upon his title, be removed.

Issues were made by separate answers of the defendants below, and the cause was by the court referred to the Hon. A. A. Davidson, master in chancery, to take evidence and report his findings of fact and conclusions of law. After taking evidence and hearing the argument of counsel, the master filed his report of findings, recommending that the suit be dismissed for want of equity. The trial court ignored the conclusions of law of the master, and entered a decree in accordance with the prayer of the petition of the plaintiff in error.

The cause was thereupon appealed to the Supreme Court of the State of Oklahoma, which reversed the decision of the trial court, and remanded the cause with directions to dismiss plaintiff's petition. (21 Okla., 630, 96 Pac., 602.) From this decision the plaintiff in error appealed to this court.

LEGISLATION AFFECTING THIS CAUSE.

It is necessary to a proper understanding of this case to review certain Acts of Congress relating to the Creek Nation of Indians and the lands of said Nation, and certain treaty negotiations between the United States and said Nation of Indians.

In 1833 the United States made a treaty with the Creek Nation of Indians, then mostly residing east of the Mississippi River. It is unnecessary to recite the various obligations and agreements of the parties which were imposed in that treaty. At that time the United States treated with all the Indian tribes, including the Creek Nation, through formal treaty. In consideration of the agreement of the Creeks to move to a new country west of the Mississippi and to surrender all the lands held by them east of the Mississippi, the United States agreed to convey to the Creek Nation a tract of land comprising what is now known as the Creek Nation in Oklahoma. It was agreed that this land should be conveyed to the Creek Nation with a contingent remainder in the United States. On August 11, 1852, in accordance with this treaty, the United States issued its patent, in which it was recited that the grantor, "in

consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, has given and granted, and by these presents does give and grant unto the Muskogee (Creek) Tribe of Indians the tract of country above mentioned, to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

After the conclusion of the treaty between the United States and the Creek Nation, and after the Creeks had removed from their eastern homes and settled in the Creek Nation and established a government and began to advance in knowledge and civilization, the United States commenced to take steps looking to the final dissolution of the tribal government, and the distribution and allotment of the lands to the individual members of the Nation.

The first step in this direction was the Indian Appropriation Bill of March 3, 1893 (27 Stat. 645, c. 209), which provides:

> "Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; * * * and upon the allotment of the lands held by said tribes the reversionary interest of the United States herein shall be relinquished and shall cease.
>
> "Sec. 16. The President shall nominate, and by and with the advice and consent of the Senate, shall appoint three commissioners to enter into ne-

gotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation, for the purpose of the *extinguishment* of the national or tribal title to any lands within that territory held now by any and all such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes respectively as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such adjustment, upon the basis of justice and equity, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the *ultimate creation of a state or states of the Union, which shall embrace the lands within said Indian Territory.*"

By various Acts of Congress the Commission to the Five Civilized Tribes was directed to continue negotiations with the tribes, to enroll those entitled to citizenship in the tribes, and to report back to Congress. Years of negotiation followed between the Commission and the Creek Nation, looking to the final dissolution of the tribe and the allotment in severalty of the lands of the tribe to the individual members thereof, which finally resulted in the agreement ratified by Congress by the Act of March 1, 1901 (31 Stat. 861) known as the original Creek Agreement, and also the Supplemental Agreement approved in 1902 by Act of Congress.

By the terms of these Acts, upon the execution of the patent by the Creek Nation, the approval of the patent by the Secretary of the Interior, the delivery of the

patent to the allottee and the acceptance of the patent by the allottee, the United States, the Creek Nation and every other citizen of the Creek Nation became divested of all interest in the land covered by the patent, and the same was thereafter held by the Indian in fee simple, subject only to the restrictions set forth in Section 7 of the Act of March 1, 1901, and Sec. 16 of the Act approved June 30, 1902.

On the 3rd day of March, 1901, the President approved an Act to amend Section 6 of Chapter 119 of the United States Statutes at Large, Numbered 24, page 390, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Section 6, Chapter 119, United States Statutes at Large, Numbered 24, page 390, is hereby amended as follows, to-wit: After the words 'civilized life' in line 13 of said Section 6, insert the words 'and every Indian in the Indian Territory.'"

The report of the Committee on Indian Affairs of the Senate in support of this bill, being Report No. 2483, made to the 56th Congress, 2nd session, on the 28th day of February, 1901, contained some of the reasons why the committee advised the enactment of the law. The purpose, according to the report of the committee, was that every Indian in the Indian Territory should "at once be put upon a lawful and equal footing with the great population with whom they are now intermingled." The section, as amended, reads in part as follows:

> "That every Indian in the Indian Territory is hereby declared to be a citizen of the United States

> and is entitled to all rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The Dawes Commission negotiated the Supplemental Agreement ratified by an Act of Congress, approved June 30, 1902 (30 Stat. 500) ratified by the Creek tribe of Indians, through its National Council, on July 26, 1902, and proclaimed by the President of the United States on August 8, 1902, known as the Creek Supplemental Agreement, which as regards restrictions upon the alienation of lands, is also involved in this case.

It will be observed from the record in this case, and is admitted by counsel for plaintiff in error in their "conceded facts," that under the provisions of the Acts of Congress approved March 1st, 1901, and June 30th, 1902, above referred to, the Creek Nation, by deed bearing date of April 3, 1903, and approved by the Secretary of the Interior, conveyed to Sam Tiger the part of the lands in controversy in this action described as the southwest quarter of Section 21, Township 18 North, Range 16 East, that the said Sam Tiger was a full-blood Indian and a member of the Creek tribe, a brother of Marchie Tiger, and that he died, after issuance of patent, intestate, leaving as sole and only heir at law, Marchie Tiger; that the deed executed to Sam Tiger conveyed "all the right, title and interest of the Muskogee

(or Creek) Nation, and all other citizens of said nation, in and to said lands, subject, however, to all the provisions of said Act of Congress relating to appraisement and valuation and other provisions of the Act of Congress approved June 30, 1902." That the approval thereof by the Secretary of the Interior on the 3rd day of April, 1903, served as a relinquishment of all right, title and interest of the United States; that in like manner, the Creek Nation conveyed to Martha Tiger, Lydia Tiger and Louisa Tiger, the other lands involved herein; that all of said conveyances were made under the provisions of the Acts of Congress above referred to and the deeds delivered to the several allottees before the passage of any subsequent legislation affecting their land. After the death of said allottees and the inheritance by the plaintiff in error of their lands, being the lands involved in this action, Congress passed an act known as the Act approved April 26, 1906, which it is claimed added additional restrictions. It will be noted that this act was passed after the issuance of the patents to the allottees above named, and after their death and after the lands had been inherited by the plaintiff in error, and those patents, of course, contained no reference to, and were not issued in accordance with, or in contemplation of, the Act of April 26, 1906.

ISSUES.

1. Did the Act of Congress of April 26, 1906, by any or all of its provisions extend or was it designed to extend the restrictions upon the "inherited lands" of full-blood Creek Indians?

2. If the extension of the period of restrictions upon "inherited lands" was intended by that act or any of its provisions, is such act constitutional? In other words, was it within the power of Congress, while all of those lands were yet under *restrictions,* to extend the restrictions beyond the time fixed in the said supplemental agreement?

Taking these issues in the above order, we contend that the Supreme Court of Oklahoma was correct in holding that,

FIRST PROPOSITION.

The Act of Congress, approved April 26, 1906, did not in the Creek Nation operate to extend beyond August 8, 1907, restrictions against alienation by full blood Indians of lands inherited by them.

This involves a construction of Sections 19, 20, 21, 22 and 23, of the Act of Congress, approved April 26, 1906, entitled, "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." Said Sections 19, 20, 21, 22 and 23, are as follows:

> "Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood pos-

sessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members or any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed, but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided, and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

"Sec. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing, and subject to approval by the Secretary of the Interior and shall be absolutely void

and of no effect without such approval; Provided That allotments of minors and incompetents may be rented or leased under order of the proper court; Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"Sec. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes die intestate, without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment, prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before the final distribution of the tribal property, the land shall escheat to and vest in such *state* or territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws, who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may, within sixty days from the passage of this act, appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed."

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and

minor heirs of such decedent then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner." (34 Stat. L., 137).

Section 19 embodies what is commonly known as the "McCumber Amendment." This section provides:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands *allotted to him* for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress."

By this Section 19, Congress undertakes to extend restrictions upon the alienation by the *allottee* for a pe-

riod of twenty-five years after the passage and approval of this act. Whether this is constitutional or unconstitutional will not be discussed in this part of the brief, that being left for argument later on.

Before proceeding to discuss the effect of Section 22 of this act, which we shall contend in no sense and in no manner extended the restrictions or undertook to extend the restrictions on alienation, either on the lands of the allottee or the heirs of the allottee, it is proper to refer to the restrictions existing against alienation before the passage of this Act of Congress in April, 1906.

In 1900, the Commission to the Five Civilized Tribes negotiated what is commonly known as the Original Agreement with the Creek Nation, which was submitted to Congress for its approval, and was approved by Congress on March 1, 1901, and subsequent thereto, on May 25, 1901, ratified by the tribe. Section 7 of said Original Agreement is the only one therein imposing restrictions against the alienation of lands, and is as follows:

> "Section 7. Lands allotted to citizens hereunder shall not in any manner whatsoever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.
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> "Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for

> which he shall have a separate deed, conditioned as above: Provided, That selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.
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> "The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation" (31 Stat. L., 861).

It will be seen that "such lands shall not be alienable by the allottee *or his heirs* at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

Thereafter, and in 1902, an agreement was negotiated with the Creek tribe, known as the "Supplemental Agreement," and ratified by the tribe on July 26, 1902, and proclaimed by the President on August 8, 1902. Section 20 of the said Supplemental Agreement is as follows:

> "This agreement is intended to modify and supplement the agreement ratified by said Act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty or law in conflict therewith." (32 Stat. L., 500).

By Section 16 of this Supplemental Agreement some additional restrictions were added, and in fact said Section 16 of the Supplemental Agreement is a substitute for Section 7 of the Original Agreement, and furnishes the only restriction against the alienation of the allotment by the allottee or his heirs.

Said Section 16 of the Supplemental Agreement is as follows:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.
>
> "Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from

> such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

By this section it will be seen that "Lands allotted to citizens shall not, in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee *or his heirs* before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior."

We insist that the restrictions against the alienation by the allottee are personal to the allottee and do not run with the land. The restrictions against the alienation by the heirs are personal to the heirs and do not pass with the land to a vendee of the heirs. We insist that but for the words in Section 16, *"or his heirs,"* there would have been no restrictions against sale and alienation by the heirs of an allottee, although such heirs may be full-blood or of any other degree of blood, and have an allotment of their own as a citizen or citizens of the Creek Nation. In other words, the restrictions against the alienation are a personal disability, not passing with the land, not attached to the land, and not descending to the heirs, the title being absolute and not held in trust by the United States. The only restriction upon the heirs is a similar restriction—that is, a

personal disability—placed upon them by the express provision of Section 16. If the words "or his heirs" had been left out, then such heirs could have unquestionably sold and conveyed the land, because the restriction against the alienation was personal to the allottee and analogous to the disability of minority, as said by some of the authorities. A minor cannot sell or alienate his lands because of the disability of minority. Such disability of minority does not run with the land, but is a personal disability. The heirs of a minor, if they are adults and otherwise competent, can sell and convey lands inherited by them from such minor ancestor. A *non compos mentis* is laboring under a personal disability which does not attach to nor run with his land, and upon his death his adult heirs may sell and convey such lands acquired by them through such *non compos mentis* ancestor. In the case of *McMahon* v. *Welch*, 11 Kansas, 290, the Supreme Court of that state, in discussing restrictions against the alienation, where the statute said nothing about the heirs, held as follows:

> "The incompetent Indians unquestionably held the same kind of title to their lands that the competent Indians did to theirs, except that the incompetent Indians could not sell or convey their land for five years, and not then without the consent of the President of the United States. This restriction seems to be purely personal to the incompetent Indians, and does not affect their title to the land. It was simply an incapacity to sell, similar to the disability of a minor to sell his lands. Hence, admitting that Harley Coon, the incompetent Wyandotte Indian, could not sell or convey his land to

> anyone, still could not Mary Nichols, who must be presumed to be competent, and to whom the said land descended in 1857, sell and convey it? Can it be possible that this restriction was intended to run with the land, and to rest upon any person and every person who might afterwards own the same? Undoubtedly it was intended that those who were competent to be entrusted with the control and management of their affairs and interests should be entrusted with the control and management of their own affairs and interests in every respect; and, therefore, it must have been intended that if land descended from an incompetent to a competent Indian, the competent Indian should have the power to sell and dispose of it as he might choose."

The statute under construction by the Supreme Court of Kansas, in that case, placed restrictions upon the right to sell by incompetent Wyandottes, but placed no restrictions upon competent Wyandottes. Incompetents were orphans, minors, and those of unsound mind.

In the case of *Oliver* v. *Forbes*, 17 Kansas, 128-130, this question of the restrictions running with the land or being personal to the allottee is discussed by the court, but it was held that it was not necessary to decide the point in that case.

However, in the later case of *Clark* v. *Lord*, 20 Kansas, 393-396, the court unequivocably passed upon this point. The court said:

> "The patent was not issued to Eleanor Richardson, but to the heirs of Eliza Richardson, and said Eleanor Richardson obtained her interest, not as an allottee, nor as the patentee, but by virtue of the laws of the State of Kansas, which authorized her, as an heir of Eliza Richardson, to inherit the

estate of her sister. If Eliza had lived the lands would have been allotted and patented to her. After her death they were patented to her heirs, without naming them; and the law of the state determined who these were. Eleanor simply inherited the lands granted to Eliza during her life; and the patent is evidence of the partition of the lands, and the division made in pursuance of the treaty. The death of Eliza Richardson did not change the terms and conditions of the treaty, nor annul the grant to her; but as the patent could not issue to a dead person, it was necessarily issued to the heirs of Eliza; but such heirs were not controlled by the restrictions applicable to the allottees and patentees."

"If the patent had been issued to Eliza during her lifetime, her death would have abrogated the restrictions on the alienation of the land; and having issued after her decease, it placed the heirs in the same condition, as to their rights in the property, as if issued before. These restrictions should have been omitted from the patent, as they could not apply to the heirs of the allottee; and being unauthorized and unwarranted, they were void, and constitute no restraint on the conveyance of the premises."

The restrictions against alienation imposed by Section 7 of the Original Agreement, and Section 16 of the Supplemental Agreement were personal to the allottee and his heirs. These restrictions were imposed upon the allottee and his heirs without regard to the degree of blood of the allottee or his heirs. They stood against all citizens, allottees and heirs. These restrictions expired by the express provision of Section 16, "five years from the date of the approval of this Supplemental Agreement." The Act of Congress, embodying this agreement

was approved by the President on June 30, 1902, the agreement was submitted to the National Council of the Creek Nation and ratified by it on July 26, 1902, and the proclamation by the President required by Section 22 of said Supplemental Agreement was made on August 8, 1902. The five years' limitation on the power of alienation on the part of the allottee or his heirs expired five years from August 8, 1902. The five years' restrictions on alienation by the allottee or his heirs had unquestionably expired before the last deeds taken by defendants in error were executed and delivered. The restrictions against alienation did not debase the title below a fee simple.

Libby v. *Clark,* 118 U. S., 250, 30 L. Ed., 133; *United States* v. *Payne Lumber Co.,* 206 U. S. 467, 51 L. Ed., 1139.

It, therefore, becomes necessary to recur to the Act of Congress approved April 26, 1906, known as the Curtis Bill, and heretofore referred to, in order to determine whether or not there has been since the ratification and approval of the Supplemental Agreement any legislation by Congress extending the restrictions upon alienation by "his heirs." It is insisted by plaintiff in error that Section 19 of said Act of Congress, construed with Section 22 of said act, extended the restrictions upon full-blood heirs for a period of twenty-five years after the approval of said act on April 26, 1906. Section 19 of said act, known as the McCumber Amendment, extends the restrictions upon the "power to alienate, sell, dispose of,

or incumber in any manner any of the lands *allotted to him* for a period of twenty-five years," etc. Clearly, this pertains to the allotment of the citizen. It applies only to the allottee's allotment as distinguished from lands he acquired as an heir. This Section 19 applied only to full-blood Indians and clearly extends no further than their own allotments. An allotment in the Creek Nation is defined by Sections 2 and 3 of the Original Agreement. In Section 3 of the said Original Agreement, it is provided, among other things, that "160 acres of land, valued at $6.50 per acre, shall constitute the standard value of an allotment, and shall be the measure of the equalization of values."

Section 20 of said Curtis Bill now under discussion applies to leasing and rental contracts by full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes. No reference is made either in Section 19 or in Section 20 to heirs. Section 21 mentions heir or heirs, but there will be found in this section no provisions in regard to alienation and nothing in regard to restrictions against alienation. Sections 20 and 21, separate Section 19 from Section 22, and introduce legislation foreign to the provisions of Section 19 and Section 22, and, therefore, clearly show a legislative intent to in no way connect Section 22 with Section 19. Section 22 is entirely cut off and separated from Section 19, and is not intended in any manner to repeal or modify or extend the provisions of Section 19.

Section 22, as heretofore set out, provides:

"That the adult heirs of any deceased Indian

> of either of the Five Civilized Tribes * * * may sell and convey lands inherited by them; and if there be both adult and minor heirs of such deceased, then such minors may join in a sale of such lands by guardian. * * * And in case of the organization of a state or territory, then by proper court of the county in which said minor or minors may reside." * * *

These provisions of Section *22* operate to remove the restrictions upon heirs. The only restrictions on heirs, as heretofore pointed out, are found in Section *7* of the Original Agreement, and Section 16 of the Supplemental Agreement. The restrictions against alienation by the heirs would have expired either on July *26*, 1907, or August 8, 1907, under the provisions of Section 16 of the Supplemental Agreement, but, without waiting for such expiration, Congress sought to remove the restrictions upon such heirs who were adults and also authorized the sale of lands of minor heirs and empowered the courts to make such sales.

The last sentence in Section *22* is the one insisted upon by plaintiff in error as extending restrictions upon heirs who are full-blood Indians, and making the sale by such full-blood heirs subject to the approval of the Secretary of the Interior. The last sentence is as follows:

> "All conveyances made under *this provision* by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

This sentence is in the nature of a proviso, and has no reference or application to Section 19, but is expressly confined and limited in its operation to Section 22. It must be construed and interpreted as a part of Section 22. It will be noticed that this proviso does *not extend* the restrictions upon heirs who are full-bloods. It simply requires conveyances made under "this provision" by heirs who are full-blood Indians to be approved by the Secretary of the Interior. "This provision" means Section 22. In other words, all adult heirs are empowered to alienate without the approval of the Secretary, *except* heirs who are full-blood Indians. The restrictions on full-blood heirs were simply retained and not repealed. The restrictions on heirs who are not full-bloods were removed.

We have conclusively shown that the only restrictions on heirs expired five years from the date of the approval of the Supplemental Agreement, which was on August 8, 1907. Certainly this last sentence in Section 22 does not extend the restrictions against alienation by heirs who are full-bloods, but simply left such full-bloods under the restrictions already existing, which expired five years from the date of the ratification of the Supplemental Agreement. This last sentence is a proviso or exception. Turning to the books upon statutory construction, we find that, "A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or

restrains its generality, or excludes some possible ground of misinterpretation of its extent."

Black on Interpretation of Laws, page 270.

The same authority further says:

"The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence, it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope."

Black on Interpretation of Laws, page 273.

Another eminent authority says:

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it shall be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect."

In the same section the author further says:

"The proper function of a proviso being to limit the language of, it will not be deemed intended from *doubtful* words to enlarge or extend the act or provision on which it is engrafted. Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly con-

strued and limited to objects fairly within its terms."

Sutherland on Statutory Construction, Vol. 2, Sec. 352.

In delivering the opinion of the court in the case of *United States* v. *Dickson,* 15 Peters, 141, 165, Mr. Justice Story said:

> "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions, only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

That a proviso is construed strictly and takes no case out of the enacting clause which does not clearly fall within its terms, we call your attention to the following authorities:

Ryan v. *Carter,* 93 U. S., 78, 85, 23 L. Ed., 808;

United States v. *Alston Newhall & Co.,* 91 Fed., 529;

Carter v. *Hobbs,* 92 Fed., 599;

Wall v. *Cox,* 101 Fed., 409;

In re Matthews, 109 Fed., 614;

Boston Safe Deposit & Trust Company v. *Hudson,* 68 Fed., 760;

United States v. *Schilerholz,* 137 Fed., 618;

Gould v. *New York Life Insurance Co.,* 132 Fed., 929;

Murray v. *Beal,* 97 Fed., 569;

Paxton Lumber Co. v. *Farmer's Lumber Co.,* 50 Am. St. Rep., 596.

Not only will the proviso be strictly construed but the general rule of interpretation is that a proviso must be construed with reference to the subject matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

Boston Safe Deposit & Trust Company v. *Hudson*, 68 Fed., 760;
United States v. *132 Packages of Spiritous Liquors*, 65 Fed., 983;
Chattanooga R. & C. R. Co. v. *Evans*, 66 Fed., 814;
In re Matthews, 109 Fed., 614;
McRae v. *Holcomb*, 46 Ark., 306;
Bragg v. *Clark*, 50 Ala., 363;
Black on Interpretation of Laws, page 275;
Sutherland Statutory Construction, Vol. 2, Sec. 352.

The last sentence in Section 22 under consideration does not begin with the word "provided" and it is not necessary in order for a clause to operate as a proviso for the section to be preceded by the term "provided."

Black on Interpretation of Laws, page 270.

The last sentence in said Section 22, is, by its own terms, expressly made a proviso or exception. It says "all conveyances made *under this provision* by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe." The very words of the proviso limit its operation to Section 22. It says "all conveyances made *under this provision*," meaning all con-

veyances made by heirs under Section 22, shall be approved by the Secretary of the Interior, when such heirs are full-blood Indians. The effect of this last sentence in Section 22, which we insist is a proviso, is a limitation upon the enabling provision of said Section 22, and amounts to nothing further than an expressed disclaimer of any intention on the part of Congress to remove *existing* restrictions against alienation on a particular class of heirs, to-wit: full-blood heirs. The existing restrictions against alienation on all kinds of heirs in the Creek Nation, whether full-blood, mixed blood, or not of Indian blood, will be found in Section 16 of the Supplemental Agreement, and but for the provision of Section 22 of said Act of Congress of April 26, 1906, all classes of Indian heirs would remain under the restrictions embodied in Section 16 of the Supplemental Agreement. The last sentence in Section 22 constitutes a proviso, carving out and removing from the enabling operation of said Section 22, full-blood heirs. That particular class of heirs was therefore left just where they were before the passage of the act, with no greater and no less rights or privileges. It is insisted, however, by counsel for the plaintiff in error, that a proviso, while ordinarily restraining and modifying the enacting clause or section of which it forms a part, may have effect extending beyond the section of which it forms a part, and may operate in an enlarged sense so as to qualify a preceding section, or the whole act. We have no quarrel to make with this proposition of statutory construction, but insist that it has no

application to the interpretation of the statutes under consideration. A proviso may amount to a separate enactment by way of amendment, but such is not the case here. The proviso specifically announces its own limitations and modifications, and the scope of its own operation, and this announcement is made when it said *"all conveyances made under this provision,"* etc.

HISTORY OF THE ACT APPROVED APRIL 26, 1906.

A great deal is said by counsel for plaintiff in error in regard to the rule of statutory construction involved in the interpretation of statutes in *pari materia*. A great deal of authority is cited to show the application of the rule which we deem unnecessary to here review.

Counsel for the plaintiff in error overlooked one very material fact in discussing the rule of statutory construction involved in the interpretation of statutes in *pari materia*, and that is—the Act of April 26, 1906, containing the sections now under consideration was general legislation, applicable to all the Five Civilized Tribes. It was applicable to the Choctaw, Chickasaw, Cherokee and Seminole Nations, as well as to the Creek Nation. Counsel for the plaintiff in error, however, have presented their whole case upon the theory that the only statutes and agreements upon the subject under consideration, are the treaties or agreements made with the Creek Nation, and the subsequent Acts of Congress. The operation and effect of the Act approved April 26, 1906, now under consideration, is very different in the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the

Seminole Nation, and the Creek Nation. The scope and effect is wider in some than in others, and this important fact should by all means be well borne in mind throughout the consideration of this case.

Counsel for the plaintiff in error seem to think that in the provisions of Section 23 of said Act they have discovered a key to the meaning of all the other sections.

Section 23 is as follows:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

Counsel for plaintiff in error say that they assume that we will concede that the proviso in Section 23, limiting the power of a full-blood Indian to devise his real estate, is a limitation put upon the power of a full-blood Indian to devise by last will any real estate to others than his heirs at law, except upon the approval of a judge of the United States Court or a United States Commissioner. Yes, we admit that. They further say that:

> "Defendants in error, therefore, find themselves in the position of contending that it was the purpose of Congress by the provisions in this act to permit a full-blood Indian, however incompetent he might be, to sell and dispose of inherited lands as he might determine, without the benefits of any

> safeguards whatever, but that he is prohibited from devising and disposing of the same lands by last will and testament to others than his legal heirs except upon the approval of the judge of the court or a commissioner. There is nothing whatever in Section 23 that would indicate that its provisions are merely temporary, and that it is intended that they are only to be effective for the time between the approval of the act and the expiration of the five year period of limitations of the supplemental agreement."

For the benefit of counsel for plaintiff in error, we will now state that we are magnanimous enough to make this admission, but we confess that we are too obtuse to discover in Section 23, and the construction placed thereupon by said counsel, any light or evidence favorable to their contention in this case.

Section 23 does not undertake to prohibit a full-blood Indian from disposing of either his own allotment or lands he acquired by inheritance, by will. The full-blood Indian is declared to have full testamentary power, and there is no prohibition against his devising his land or allotment to whomsoever he may desire. He may, by will, select the object of his bounty, and may make his devise to a total stranger. The only limitation contained in said Section 23 is upon the method of *executing his will*. His power to devise is expressly recognized. That Congress saw fit to throw around him safeguards in the making and execution of his testamentary instrument is not the slightest evidence that Congress would not consider him fully competent to sell, convey and alienate, during his lifetime, lands acquired by him through in-

heritance. If a full-blood Indian desired to devise his land to a stranger, he was required to acknowledge the same before a judge of the United States Court, or a United States Commissioner and obtain the approval of one or the other.

Congress, by Act approved May 2, 1890, put in force in the Indian Territory, Chapter 58 of Mansfield's Digest of the laws of Arkansas pertaining to wills and testaments. By the Indian Appropriation Act of June 7, 1897 (30 Stat. L., 62), "the laws of the United States and the State of Arkansas, in force in the Indian Territory, shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes."

By Section 6500 of Mansfield's Digest put in force, it was expressly provided that:

> "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

This section of Mansfield's Digest also constituted a limitation and restriction upon the manner of executing

a will. We assume that every state in the Union has prescribed by statute certain necessary requirements in the execution of testamentary instruments. Such statutes, however, have no effect upon the power of a citizen to deal with his property during lifetime, and to convey, sell, grant, or alienate it in such a way as he sees proper. The law even prescribes a method of making deeds, and the statutes of frauds and perjury in force in every state deny the power of the citizen to make a valid contract for the disposition of his land, except by a written instrument, signed by the party to be charged. It has always been the policy of the law to not only prescribe the mode of executing wills, but also to regulate the disposition, and restrain in certain limits the objects of the testator's bounty.

Underhill on the Law of Wills, Vol. 1, Section 16, is as follows:

> "The right to make a disposition of property by will is neither a natural, nor, in the United States, a constitutional right. It is solely the product of statutory enactment in the case of real property, and of judicial legislation in the case of personal property. We can point out the exact date upon which it was created. The testamentary privilege, and its extent and limitation, depend wholly upon statute, not only as to their existence, but as to the mode in which it may legally be exercised. The legislature, both in England and the United States has repeatedly prescribed to whom property may be given by will, how much may be disposed of by will in particular cases, and what species of interest will be wholly exempt from testamentary disposition. And as the legislature

> has conferred the power, so the legislature may restrain its operation, confine it to particular classes of persons, or abolish it altogether, so far as the wills of persons who die after the enactment of the statute are concerned."

Counsel for plaintiff in error also quote Section 20 pertaining to leases and rental contracts, and they construe this section to apply to inherited land as well as allotted land. While it is clear to our minds that Section 20 is a restriction against the Indian leasing his own individual allotment for a long term without the approval of the Secretary of the Interior, and that it has no application to inherited lands, yet this section is not before the court for consideration, and we are not interested or concerned in its interpretation. However, we can readily see why long term leases would be prohibited without the approval of the secretary, although the allottee or Indian had the right to otherwise alienate and dispose of his lands. The prohibition against leasing was for the purpose of preventing speculators from obtaining advantage over the Indian by first getting a long term lease, and by that means enable himself to practically dictate the purchase price on a sale. If Section 20 is entitled to any consideration in this discussion, it seems to us that it is favorable to that construction, holding that the lands were alienable. Congress might well have had in mind preventing speculators from obtaining long term leases for the purpose of holding the advantage in the negotiations for a sale with the Indian. The long term lessee could practically name the con-

sideration for a purchase. In the absence of statute, the lease, no matter for how long, does not offend the rule against perpetuity, because it does not suspend the power of alienation. Yet, in several states we find statutes regulating leasing, and limiting the period of time for which leases can be made. In Alabama it is provided by statute that leases shall not be made for a longer period than 20 years, and in New York leases of agricultural lands for a longer period than twelve years are prohibited by constitutional provisions.

See Jones on Landlord and Tenant, Sec. 111.

Counsel for plaintiff in error have extracted great comfort from the Act approved May 27, 1908 (35 Stat. L. 312) and especially Sections 8 and 9 of said act. They say that said Act of May 27, 1908, constitutes a legislative construction of all the prior laws applicable to the affairs of the Creek Nation. They again overlooked the potent fact, however, that the Act approved May 27, 1908, is a general law, applicable to all the respective members of the Five Civilized Tribes, and not a special act locally applicable to the Creek Nation. We admit that a subsequent act in *pari materia* is some evidence to be considered in construing a former act. But we confess that our observation of Indian legislation by Congress has not created upon our part much regard for the doctrine of legislative construction. It must be remembered that the deed in this case was made to the defendants in error in August, 1907, almost a year before the Act approved May 27, 1908, became operative; the provisions of said act being expressly suspended for

sixty days after its passage and approval. It, therefore, went into effect on July 27, 1908. The parties to this case, as well as many others, acted upon the law then in existence. This litigation was instituted and passed through the lower court and was argued and submitted in the Supreme Court of Oklahoma prior to the Act approved May 27, 1908, and no doubt the opinion of the Supreme Court of Oklahoma was prepared and ready for delivery before that act was ever published. It is a further known fact that the Interior Department has been jealous of its jurisdiction over Indian affairs, and that it has contested every inch it has been forced to surrender.

The effort to free this country from departmental control and supervision has been fiercely contested, both in the halls of Congress and the judicial forum. We are here reminded of an incident occurring in the United States Circuit Court of Appeals for the Eighth Circuit, during the argument of an important case recently submitted, where an Assistant Attorney General of the United States was contending that these Indians were yet wards of the Nation, and that the Federal guardianship had never been released or discharged. One of the learned judges asked the representative of the Government when this guardianship would cease, to which an unsatisfactory reply was made, whereupon the judge suggested that the guardianship would probably cease about the time the appropriation made by Congress was exhausted.

The question in this case is not whether Congress had the power in 1908 to prohibit alienation by full-blood heirs, but the question is—could full-blood heirs alienate lands inherited by them in the Creek Nation on August 8, 1907? Counsel for the plaintiff in error in their brief, on pages 22 and 23, say that:

> "From the inception of the legislation providing for allotment of these lands to the last act upon the subject, no affirmative expression by Congress can be found removing restrictions or government control from 'inherited lands' of full-blood Indians;"

That is begging the question. Our response to that assertion is that no legislation can be found in force at the time this deed was made to the defendant in error, denying full-blood Indians in the Creek Nation the right to alienate land inherited by him. No act removing such restrictions was then needed, as all restrictions had expired by limitation. It was not necessary to have a declaration from Congress to the effect that full-blood heirs could alienate in the Creek Nation, because the restrictions against alienation had expired on August 8, 1907, in so far as inherited land was concerned.

LEGISLATIVE CONSTRUCTION.

With respect to legislative construction, Mr. Chief Justice Marshall in the case of *Postmaster General* v. *Early et al*, 12 Wheat., 148, said:

> "It is true that the language of the section indicates the opinion, that jurisdiction existed in the Circuit Court, rather than an intention to give it: and *a mistaken opinion of the legislature concerning the law, does not make law.*"

In the case of *Hamilton* v. *Rathbone*, 175 U. S., 420, Mr. Justice Brown said:

> "The decisive question then is whether Sec. 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act. The general rule is perfectly well settled that, where a statute is of doubtful meaning, and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. *But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given it.*"

In the case of *Dewey* v. *United States*, 178 U. S., 521, Mr. Justice Harlan said:

> "This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the government in reference to any particular subject of legislation, this court has said, '*is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.*' *Hadden* v. *The Collector*, 5 Wall., 107, 111, sub. nom. *Hadden* v. *Barney*, 18 L. ed., 518, 519. Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect

> to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed."

As heretofore said, counsel for plaintiff in error lay great stress upon Section 9 of the subsequent Act of Congress approved May 27, 1908, wherein it is provided that:

> "The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's lands: Provided, that no conveyances of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee; Provided, further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die, leaving an issue surviving born since March 4, 1906, the homestead of such allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section 1 thereof, for the use and support of such issue during their life or lives, until April 26, 1931;" etc.

Counsel say that this Section 9 is an expressed statutory recognition of the then existence of restrictions against alienation by full-blood heirs. That might be true in the Cherokee Nation, but not true in the Creek Nation. That might be true in the Seminole Nation. The provisions of the agreement with the Cherokee Na-

tion, ratified in 1902 and the provisions of the Seminole Agreement ~~ratified~~ made in 1897, are entirely different from the provisions of the agreements made with the Creek Nation. The agreement with the Seminole Nation was ratified by Act of Congress approved July 1, 1898 (30 Stat. L. 567). This agreement contains the following expressed restrictions against alienation, to-wit:

> "All contracts for sale, disposition, or incumbrance of any part of any allotment made prior to the date of the patent shall be void."

No patents in the Seminole Nation have yet been issued, and an overwhelming majority of the allottees in the Cherokee Nation have not yet received their patents, and were therefore unable to alienate at the time the Act of May 27, 1908, was passed. The agreement made with the Cherokees and ratified by Act of Congress approved July 2, 1902 (32 Stat. L. 716), contains the two following sections with regard to alienation:

> "Section 14. Lands allotted to citizens shall not, in any manner whatever, be incumbered, taken or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act.
>
> "Section 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead, as herein provided, shall be alienable in five years after issuance of patent."

The Attorney General of the United States, on August 20, 1907, rendered an opinion construing Sections 14 and 15 of said Cherokee Agreement, in which opinion

he held that the restrictions against alienation existed for a period of five years from and after the issuance of patent, and not from the ratification of the Act of Congress. In other words, he held that the five year restriction upon alienation did not begin to run until the issuance of patent.

Opinions of Attorney General, Vol. 26, pp. 351-355.

However, it is not our purpose to discuss the Cherokee or the Seminole Agreements, nor the law applicable to those tribes, and we assume that the court will not digress to settle the status of the allottees and heirs in any of the tribes except the Creek Nation. The first patent in the Cherokee Nation was issued in February, 1905, and a large majority of the patents to the allottees in the Cherokee Nation have not yet been issued or delivered. Counsel for plaintiff in error in their brief on page 51 say:

> "Again, if restrictions upon 'inherited lands' of full-blood Indians expired on August 8, 1907, as defendants contend, what will they say was the purpose of Section 9 of the Act of 1908? Will they contend that Congress did not know that under its former acts, restrictions had already expired, or will they assert that Congress simply attempted to accomplish a purpose possibly beyond its power, that of reimposing restrictions which had already expired."

Our answer to that is that Congress either did not know the prior law, or intended to *continue* restrictions against full-blood heirs in *those Nations* from

which restrictions against alienation had not expired. But the fact that restrictions against alienation by full-blood heirs in the Creek Nation had expired long before the act approved May 27, 1908, went into force, is not conclusive evidence that Congress did not know what it was doing when it passed said latter act. No one, either in or out of the Interior Department, has had the temerity to insist or contend that restrictions against alienation by all citizens of the Creek Nation of less than full-blood, did not expire on August 8, 1907. That a mixed-blood allottee could sell his own allotment after August 8, 1907, has never been denied. A mixed-blood of three-fourths degree, or any other degree of blood less than a full-blood, could sell his own allotment, or lands inherited by him, from and after August 8, 1907. Yet, the very first section of the Act of Congress approved May 27, 1908, if read in contemplation of no other agreements and laws than those applicable *alone* to the Creek Nation, convicts Congress of either attempting to place restrictions upon mixed-bloods who were entirely free to alienate, or convicts Congress of being entirely ignorant of the fact that restrictions against all mixed-bloods had expired on August 8, 1907. This first section conclusively shows that counsel for plaintiff in error were correct when they assumed that we would contend that Congress did not know that under its former acts, restrictions had already expired, or that Congress was simply attempting to accomplish a purpose, possibly beyond its power, that is, imposing restrictions on a class from which they had already expired,

if this law is to be considered as applicable to the Creek Nation alone. Section 1 of said Act of May 27, 1908, expressly says:

> "That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions."

So far as the Creeks were concerned, this provision removed no restrictions except upon homesteads and minors. The appropriation act approved April 21, 1904, (33 Stat. L. 189) among other things expressly provided that:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe," etc.

The restrictions against all mixed-bloods in the Creek Nation expired on August 8, 1908. Yet, the very next sentence in the first section of said Act approved May 27, 1908, is as follows:

> "All lands, except homesteads of said allottees enrolled as mixed-blood Indians having half or more than half and *less* than three-quarters Indian blood shall be free from all restrictions."

This sentence is of no effect in so far as the Creek Nation is concerned, because the restrictions expired on the surplus of all mixed-bloods on August 8, 1907. The very next sentence, however, is as follows:

> "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled *mixed-bloods of three-quarters or more Indian blood*, including minors of such degrees of blood, *shall not be subject to alienation*, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

As heretofore often reiterated, the restrictions against alienation by all mixed-bloods, whether three-fourths, more or less, expired on August 8, 1907, in the Creek Nation, with respect to all the lands, whether allotted or inherited, except homesteads. Yet, here is a direct expression and positive declaration by Congress that "all allotted lands of enrolled full-bloods and enrolled *mixed*-bloods of three-quarters or more Indian blood, including minors of such degree of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions," etc.

This provision if applied to the Creek Nation, undertakes to prohibit a class of citizens and allottees, three-quarters mixed-bloods or over, from alienating any of their allotted lands although the same had been free since Aug. 8, 1907. It is the duty of the court to construe a statute in such way as to not convict the legislative body of enacting an absurdity, and this provision must either be held to be an attempt upon the part of Congress to place restrictions on mixed-blood Creeks from whom restrictions had already expired, or that Congress intended this to apply in the Cherokee Nation and in the Seminole Nation, where it is entirely reasonable to hold that no mixed-blood could alienate his allotment at the time this act was passed. The next sentence, however, expressly shows that Congress understood that in some of the tribes, notably the Creek Nation, restrictions had already expired on a large class of citizens. Congress says:

> "The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

In other words, this whole Act approved May 27, 1908, so much relied upon by counsel for plaintiff in error, as a legislative construction, was passed by Congress as a general law for the Five Civilized Tribes, to be applicable however, in so far as it provided for further restrictions against alienation, only to those tribes in which the class herein specified were still laboring

under the disability imposed by prior legislation restricting their rights to sell and convey. It must either be given that interpretation, or violence must be done to the expressed provision of the act itself, wherein Congress positively said that it should have no effect upon any citizens from which restrictions against alienation had already been removed, or the restrictions expired. Section 2 of said act deals with land from which restrictions have never been removed. Section 4 declares that all lands from which restrictions have been removed shall be subject to taxes and all other civil burdens, with the proviso thereto attached exempting the same from debts arising or existing prior to the removal of restrictions.

Section 9 simply declares "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

We contend that this provision should be applied and held operative in those Nations from which restrictions against alienation by full-blood heirs had not been removed. It has no application to the Creek Nation. Its application to and operation in the Creek Nation is expressly disclaimed by Congress in that part of Section 1 where it positively declares that "nothing herein shall be construed to impose restrictions removed from lands by or under any law prior to the passage of this act."

If Congress in the Act of May 27th, 1908, undertook, with or without the consent of the tribe, to impose restrictions upon members of the tribe from whom restrictions had already been removed, a serious constitutional question would at once arise.

Could Congress place restrictions upon the power of a citizen of the United States and a citizen of the *State* of Oklahoma, by which such citizen of the state was denied the right to alienate his property? These Indians were not residing on an Indian reservation in the bounds of a state, and although we understand that the courts have held that full citizenship in the United States and a state is not incompatible with the restrictions against alienation, yet no decisions can be found holding that the Congress has the power to impose restrictions against alienation by a citizen of the state, though he be an Indian. These Indians were created a state, and they participated in organizing the State of Oklahoma as much so as the white citizens. Several were members of the Constitutional Convention that formed the constitution, and many were elected to offices in the state, and one is at present representing the State of Oklahoma in the Senate of the United States. The State of Oklahoma was not formed out of a territory, a portion of which was segregated as an Indian reservation. But these Indians and their territory were made a state. It is not necessary, however, here to go into these questions, as the constitutionality of the Act of May 27, 1908, cannot be assailed or determined in this controversy.

FURTHER ON THE HISTORY OF LEGISLATION.

It is insisted by counsel for plaintiff in error that the last sentence in Section 22 of the Act approved April 26, 1906, should be carried across Section 21 and Section 20, and engrafted on Section 19, which is commonly known as the McCumber Amendment, and which latter mentioned section imposes restrictions against alienation for a term of 25 years against the allottee in person, and prohibits the alienation by him of land "allotted to him." This act was introduced in the House in the first session of the 59th Congress, and is known as H. R. 5976. It passed into the Senate of the United States on January 22, 1906, and was twice read and referred to the Committee on Indian Affairs. Section 19 of said bill, as passed by the House of Representatives on January 18, 1906, is as follows:

> "That all the restrictions upon the alienation and leasing of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, *except Indians of full-blood and except* minors, are, except as to 'homesteads,' hereby removed, and all restrictions upon the alienation of lands of allottees of said tribes who are full-blood Indians, except minors and except as to 'homesteads,' may be removed by the Secretary of the Interior under such rules and regulations as he may prescribe, and for the purpose of this act the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. Full-blood Indian allottees of said tribes may alienate any of the lands allotted to them, except homesteads, with the consent and approval of the Secretary of the Interior, and not

otherwise, and all laws or parts of laws inconsistent with the provisions of this section are hereby repealed: Provided, that the lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation so long as the title remains in the original allottee."

This Section 19, as passed by the House of Representatives, removed the restrictions upon the alienation and leasing of all Indian allottees of all the Five Civilized Tribes, "except Indians of full-blood, and except minors and homesteads" thus leaving them where they were under the Agreement of 1902. The restrictions against alienation upon the lands of full-blood Indians, except minors, and except as to homesteads, could be removed by the Secretary of the Interior. Section 22 of said act, as passed by the House, was concurred in by the Senate, with the exception that the words "or minors" were stricken out in the last sentence and instead of the proviso reading: "All conveyances made under this provision by heirs who are full-blood Indians 'or minors' are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," the proviso reads: "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Section 19 of the bill as passed by the House of Representatives, was amended in the Senate so as to provide "that no full-blood Indian of the Choctaw,

Chickasaw, Cherokee, Creek or Seminole Tribe, shall have the power to alienate or encumber in any manner any of the lands allotted to him for a period of 25 years from and after the passage and approval of this act," etc.

In the light of the original draft of this act in the form it passed the House, it would require a far stretch of imagination to attribute to Congress the intent to extend restrictions by the proviso in Section 22, with reference to Section 19 as finally passed. This proviso fixes no term or period during which full-blood Indians cannot sell land inherited by them, and therefore the term and duration of this restriction must be discovered and ascertained from an investigation of other acts. There being no provision in this whole Act approved April 26, 1906, fixing the term during which full-blood heirs cannot alienate lands inherited by them, resort must be had to some other law. We, therefore, confidently contend that the period and duration of the term for this disability is found in Section 16 of the Supplemental Agreement made with the Creeks in 1902, which section prohibits the alienation by the allottee or his heirs for a period of five years from the date of the ratification of that agreement.

The contention of counsel for plaintiff in error that a proviso may have an effect beyond the section of which it forms a part, and that it may operate upon other provisions or the whole act, cannot have any application here, for the reason that this proviso was not changed or modified in substance in the Senate, but was left sub-

stantially as passed by the House of Representatives, which House in passing Section 22 never intended the same to operate with or form a part of Section 19. Section 19 as passed by the House of Representatives was an enabling provision, and not a section extending restrictions. The proviso in Section 22 was therefore not introduced and not enacted as in any way modifying, limiting, extending or enlarging Section 19. If the Senate in amending Section 19 had have intended to therein legislate with regard to full-blood heirs, it would have been extremely easy to do so. One of the strongest evidences that the Senate never understood, and never intended that Section 19 should operate with respect to conveyances by full-blood heirs, is shown by the fact that Section 19, as originally proposed, contained the words "or his heirs." (Congressional Record, Vol. 40 Part 4, 3273). To remove all doubt, the words "allotted to him" were inserted in the final draft of the section, thus conclusively showing that there was no intention to make Section 19 apply to conveyances covering lands inherited by a full-blood citizen.

In discussing the construction of the Hepburn Act, approved June 29, 1906, containing the provision commonly known as the commodities clause, Mr. Justice White in determining the nature and character of the *interest* embraced in the words "in which it is interested directly or indirectly as a carrying corporation," said:

> "Certain it is, however, that, in the legislative process of the clause in the Senate, where the clause originated, an amendment in specific terms,

causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly *excluded* was intended to be *included*. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it."

United States v. *Delaware & H. Co.*, 213 U. S., 414.

That the Court in construing a statute has the right to consider and consult the reports of the Congressional Committees, and the progress of the bill through Congress, we call attention to the following decisions:

Oceanic Navigation Co. v. *Stranahan*, 214 U. S., 333;
The Delaware, 161 U. S., 459;
Buttfield v. *Stranahan*, 192 U. S., 470.

Counsel for plaintiff in error in their brief, page 34, say:

> "This being true we are led to inquire, why he needed this protection as to directly allotted lands and not to inherited allotments? If incompetent to preserve his holdings of the one, he is equally incompetent to preserve his holdings of the other; and while Congress might have intended to arbitrarily furnish a protection to a part of his lands and ignore another part, where both parts are equally proper subjects of their consideration, it will hardly be presumed, in the absence of an expressed declaration to that effect, that such a result was intended."

Falling back to the statutory construction of act in *pari materia*, so often reiterated in the brief of counsel for plaintiff in error, we suggest that this argument has been answered by a number of Acts of Congress. In the first place, the original agreement made with the Creeks, and ratified in 1901, prohibited the alienation of the surplus allotment for five years by the allottee or his heirs, and in the same section (Section 7) the allottee was prohibited from alienating his homestead portion of his allotment (40 acres) for a period of twenty-one years, although the same section expressly provided that in the absence of issue born to the allottee after the ratification of the agreement, "he may dispose of his homestead by will, free from the limitations herein imposed, and if this be not done, the land shall descend to his heirs according to the law of descent and distribution of the Creek Nation, free from such limitation." This Section 7 applied to all citizens of the Creek Nation, regardless of whether they were of Indian blood, mixed-bloods, or full-bloods. We next find in the Supplemental Agreement with the Creeks, ratified in 1902 (32 Stat. L.,

500), Section 16 as heretofore quoted, prohibiting alienation by the allottee or his heirs, "before the expiration of five years from the date of the approval of this Supplemental Agreement," and in the same section declaring "the homestead of each citizen shall remain after the death of the allottee, for the use and support of the children born to him after May 25, 1901, but if he have no such issue, then he may dispose of his homestead by will, free from the *limitations* herein imposed, and if this be not done (that is, if he make no will) the land embraced in his homestead shall descend to his heirs, *free from such limitation,* according to the laws of descent. (Arkansas laws) herein otherwise prescribed."

Congress and the Tribe in both of these agreements prohibited the alienation of the surplus for five years, either by the allottee or his heirs, and prohibited in addition thereto, the alienation of the homestead "for twenty-one years from the date of the deed therefor," but expressly declared that he might dispose of it by will if no children were born after May 25, 1901 (that being the date of the ratification of the Original Agreement), and that in the event no will was made, the homestead part should descend to his heirs, free from the limitations.

By the Indian Appropriation Act of April 21, 1904, (33 Stat. L., 189), it was provided that:

> "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby

> removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe," etc.

The next legislation removing restrictions is contained in the Act approved April 26, 1906, and here under consideration, which permitted mixed-bloods to sell inherited land many months before they could sell their own allotments. The first act passed by Congress looking to the allotment of the lands of the Five Civilized Tribes, was the Act of March 3, 1903 (27 Stat. L., 645), heretofore quoted, by which the President was authorized to nominate three commissioners to negotiate with the Indian Nations composing the Five Civilized Tribes, with a view to bringing about the allotment of their lands, and in this very act Congress publicly and openly announced its purpose "to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian Territory." At the time the act approved April 26, 1906, was enacted, statehood for Oklahoma and the Indian Territory was imminent, and in fact the Enabling Act was passed and approved in less than twelve months thereafter. This Enabling Act authorized the Indians and other inhabitants to organize a State government. The members of the Five Civilized Tribes, with all other citizens residing in the Indian Territory, and the Oklahoma Territory were authorized to

form a State government under the provisions of that act. It is therefore beyond reason to assume or presume that Congress intended to tie up a vast area of land in the eastern part of the State of Oklahoma by restrictions against its alienation. The restrictions against alienation have always been preserved for the protection of the individual Indian, and to enable him to learn how to shift for himself through his period of probation. There was no reason for throwing around him restrictions which would enable him by inheritance to build up a large landed estate. The right to sell and deal with some of his lands was not only a valuable right, but a necessary right to enable him to acquire by experience, sufficient ability to protect himself against improvidence when the time arrived for the expiration of the restrictions against the alienation of his own allotment. If an infant is not allowed to stand on his legs, he will never learn to walk, and we assert from a review of the legislation that it is, and has been the evident policy of the Government to not only protect the Indian against his improvidence, but to allow him some opportunity to gain experience in trading. Unless the Indian has the right to deal with at least some of the lands, as any other citizen has, how can he ever learn to take care of his interests in dealing with his white neighbors? The right to sell land inherited furnishes him a means to improve his own allotment, and build him a home, and thus acquire the opportunity to live a civilized life. It would certainly be remarkable to attribute to Congress the absurd intention to prohibit the alienation of inherited lands forever and eternally, which

must be held in order to sustain the contention of plaintiff in error in this case.

In construing Section 22, the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Shulthis* v. *McDougal,* 170 Fed., 535, said:

> "To protect this homestead, it was made inalienable for the term of five years (meaning her allotment). The reasons for making it inalienable would not apply to lands obtained by inheritance, and for that reason, the statute last quoted was passed granting power to convey the same. The lands here in question follow under the same policy as lands obtained by inheritance, and the statute should be held to apply thereto. Berryhill, therefore, had power to make the deed to the McKays."

The government relies upon the decision of the Eighth United States Circuit Court of Appeals in the case of *Goodrum* v. *Buffalo,* 162 Fed., 817, in which case the court held that the heirs of a Quapaw allottee could not sell, convey or alienate an allotment inherited by them prior to the expiration of the 25 years' restriction placed thereon by the Act of Congress providing for allotment. We do not question the correctness and soundness of the decision of that court in that case. It is obviously right. The Act of Congress and the patent under consideration by the court in that case was capable of no other construction. The Act of Congress there under consideration, however, was very different in its language and applicable to a very different condition of affairs to the Act of Congress of April 26, 1906, and the condition of affairs the Congress undertook to meet by that legislation.

In the case of *Goodrum* v. *Buffalo*, the court had under consideration an Act of Congress of March 2, 1895, which provided that: "The Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

The patents issued to the Quapaws contained the following limitation, to-wit:

> "But with the stipulation and limitation contained in the aforesaid act, that the said land embraced in this patent shall be inalienable for a period of twenty-five years from and after the date hereof."

It must therefore, appear to any unbiased mind that the restrictions against alienation imposed by Congress in the said Act of March 2, 1895, providing for the allotment of lands in the Quapaw Reservation, were on the land, run with the land and prohibited its alienation for a period of twenty-five years without respect to whether the land during that period was owned by the allottee or his heirs. The restrictions were on the land. The allotment was rendered inalienable for twenty-five years. Nothing is said about the *allottee* not selling for twenty-five years. The prohibition against alienation was for a designated period, covered a certain time, and was to extend during that period of time without respect to person, and without regard to its ownership. When we turn, however, to the provisions of Section 19 of the Act of Congress approved April 26, 1906, we find that

the power to alienate, sell, dispose of or encumber in any manner for a period of twenty-five years from and after the passage and approval of that act, was denied, withheld, or taken away from a particular class of individuals or citizens, to-wit: the *allottees* in person and not the heirs.

Section 19 does not prohibit, as did the Act of March 2, 1895, the alienation of the *land* for a period of twenty-five years without respect to ownership or individuality.

The conditions were different in the Five Civilized Tribes to those conditions existing with the Quapaws (who were not living a civilized life) and with the view to which Congress was legislating when it passed the Act of March 2, 1895, prohibiting the alienation of Quapaw lands. That act provided for the allotment. The Quapaws were just being ushered into a new life. Otherwise with the Five Civilized Tribes. Their lands had been allotted for four, or five or six years. Restrictions had been removed from certain classes from time to time. By the Act of Congress approved April 21, 1904, the restrictions were removed from all allottees not of Indian blood.

The Quapaws had had no experience as owners of land in severalty, while upon the other hand, the members of the Five Civilized Tribes, without regard to degree of blood, had been enjoying this experiment for several years.

In order to arrive at the intent and meaning of Congress embodied in its declaration contained in Section 19

of the Act of April 26, 1906, we must take into consideration the condition of affairs in the Five Civilized Tribes, the prior legislation with respect thereto, and by this means determine the object Congress had in view. The legislation with respect to restrictions against alienation in the Five Civilized Tribes conclusively shows that Congress proposed to progress step by step and relax governmental control and supervision, and loosen "the firm cable" by degrees.

At the time the United States and the Creek Nation agreed to the allotment of the domain of the Creek Nation in severalty among its citizens, a five year restriction against alienation was deemed sufficient to enable the Indian to acquire by experience sufficient business ability to deal with his more astute pale faced brother. This restriction against alienation for a period of five years was also placed on alienation by the heirs and was deemed sufficient at that time. If these restrictions against alienation by the heirs have been extended or enlarged, some plain and unequivocal Act of Congress extending and enlarging these restrictions against alienation by the heirs, should be pointed out. Counsel for the plaintiff in error have been unable to point out any such Act of Congress, but rely upon the provisions of Sections 19 and 22 of the Act of April 26, 1906.

FURTHER ON STATUTORY CONSTRUCTION.

There is another rule of statutory construction applicable here to which we desire to call the court's attention, and that is this: Statutes in derogation of common

right are always subject to a strict construction. Any statute or Act of Congress undertaking to extend the restrictions upon alienation is a statute or act in derogation of common right. The right to sell, convey or dispose of property is a valuable right, and any law or statute undertaking to abridge such right and privilege is clearly in derogation of common rights, and therefore subject to a strict construction.

All the Indians in the Indian Territory were made American citizens by Act of Congress approved in March, 1901, and are therefore entitled to all of the rights, privileges and immunities of other American citizens. They would be subject to prosecution for treason against the United States government, and would be subject to a call to arms in defense of our common country. They are thus burdened with the responsibilities of citizenship, and at the same time should have all the rights and privileges awarded any other American citizen.

Any Act of Congress undertaking to extend the restrictions against the alienation by them of their lands is clearly an act in derogation of their property rights, especially in abrogation of their common rights. We do not mean to here discuss the constitutionality of the McCumber Amendment, but we simply desire to invoke that well established principle of statutory construction requiring any act of the legislature to be strictly and closely construed should it appear that such act sought to abridge the rights and privileges of a citizen.

We are unable to see how the proviso in Section 22 can be carried across Sections 21 and 20 and engrafted

upon Section 19, so as to indicate any intention upon the part of Congress to affect the power of alienation by full-blood heirs after the expiration of the period fixed in the Supplemental Agreement—five years' limitation.

Mr. Black says:

> "It is a well settled rule that statutes which are in derogation of common right, and which confer special privileges, or impose special burdens or restrictions, upon individuals or upon one class of the community, not shared by others, should receive a strict construction; and the courts will require that cases coming before them shall be brought clearly within the terms of such statutes before they will be held applicable thereto."
>
> Black on Interpretation of Laws, page 300.

By an Act of Congress, approved April 21, 1904, all restrictions upon the alienation of lands of allottees of the Five Civilized Tribes not of Indian blood, except minors and except as to homesteads were removed. Any statute or Act of Congress undertaking to extend restrictions against other citizens of the Five Civilized Tribes, certainly requires a strict and close construction. No liberality should be used by the courts in construing them, and no case should be considered falling within such statutes unless clearly and unquestionably placed there by the express terms of the statute.

Mr. Black in his work further says:

> "But if a statute, for any cause, disables any person of full age and sound mind from making contracts and otherwise dealing freely with his own property, it is to be construed strictly; for, although it may be *founded in wise policy and a just regard*

for the public welfare, it is in derogation of private rights. So, also, statutes requiring gratuitous services from any class of citizens are against common right and to be construed strictly. For the same reason, laws which impose restrictions upon trade or common occupations, or upon the alienation of property, are to be strictly construed, and are never extended to cases not within the expressed will of the legislature."

Black on Interpretation of Laws, pages 300-301.

There is a corollary to the above rule and that is this:

"Where the intention of the legislature is plain to confer a privilege upon those whose rights are to be affected by a statutory proceeding, in derogation of their rights of property, and the language is doubtful as to the extent of the privilege, it is the duty of the courts to give to it the largest construction, in favor of the privilege, which the language employed will fairly permit."

Black on Interpretation of Laws, page 302;
Sutherland on Statutory Construction, Vol. 2, Sec. 680;
Walker v. *City of Chicago,* 56 Ill., 277.

By these rules of statutory construction we must conclude:

First. That Section 19, known as the McCumber Amendment, must be strictly construed, and its terms confined within its express letter.

Second. That Section 19 undertakes to extend the restrictions against alienation no further than to sale or conveyance by a full-blood allottee of his allotment.

Third. That Section 19 does not affect heirs or extend the restrictions against alienation by heirs, although such heirs are full-blood Indians.

Fourth. That Section 22 removes the restrictions against heirs, and does not extend them in any sense.

Fifth. That the last sentence in Section 22 is a proviso, limited in its operation and effect to Section 22 itself, and, as such proviso, limits Section 22 to heirs who are not full-blood Indians.

Sixth. That Section 22, as a whole, does not extend the restrictions against alienation by any heirs, but leaves heirs who are full-blood Indians under the provisions of Section 16 of the Supplemental Agreement, which expired in five years after the date of the approval of said agreement in 1902.

We are unable to see how any other construction can be placed upon Sections 19, 20, 21 and 22. Clearly Congress did not extend the restrictions against heirs, although such heirs are full-blood Indians. Congress simply intended to extend the restrictions for twenty-five years on allottees who are full-bloods; to leave the restrictions already existing against heirs who are full-bloods, to-wit, the five years' restrictions under Section 16 of the Supplemental Agreement, and remove the restrictions against all other heirs.

SECOND PROPOSITION.

The Act of Congress approved April 26, 1906, insofar as it undertook to place additional restrictions on the alienation of allotted lands to which the allottee held a patent is unconstitutional and void.

On August 8, and August 13th, 1907, Marchie Tiger had full power to convey, without supervision or restriction of any kind whatever, the lands inherited by him

from his deceased ancestors, and his warranty deeds of those dates to the defendants in error were valid conveyances of his inherited lands, because:

Marchie Tiger and Marchie Tiger's ancestors were citizens of the United States.

Act of Congress, March 3, 1901, amending Sec. 6, Ch. 119, of U. S. Stat. No. 24, p. 390;
Ross v. *Ellis*, 56 Fed., 855;
United States v. *Hall*, 171 Fed., 214;
United States v. *Boss*, 160 Fed., 132;
Dick v. *United States*, 208 U. S., 352;
Report of Senate Select Committee, Vol. 1, P. V. 1906;
In re Heff, 197 U. S., 488;
Ex parte Savage, 158 Fed., 205;
United States v. *Saunders*, 96 Fed., 268;
United States v. *Kopp.*, 110 Fed., 160;
Ex parte Viles, 139 Fed., 68;
United States v. *Dooby*, 151 Fed., 697;
United States v. *Augur*, 153 Fed., 671;
United States v. *Allen et al.*, 171 Fed., 907.

Marchie Tiger's ancestors owned these lands in fee simple absolute, subject only to the condition or limitation, contained in the grant, that the lands should not be alienated by them or their heirs before the expiration of five years from August 8, 1902.

Taylor v. *Brown*, 147 U. S., 640;
Report of Senate Select Committee, Vol. 1, p. V (1906);
Act of Congress, approved March 1, 1901 (31 Stat., 861), Section 7;

Act of Congress, approved June 30, 1902, (32 Stat., 500), Secs. 6 and 16.

It is not within the power of Congress to create a condition or limitation, or extend a condition or limitation affecting these lands, after conveyance to the allottees and the acceptance of the conveyance by the allottees, in fee simple, subject only to the definite condition or limitation expressed in the grant.

Jones v. *Meehan*, 175 U. S., 1;
In re Heff, 197 U. S., 488;
Report of Select Senate Committee, Vol. 1, p. V (1906).

II.

All other cases adjudicated by this court, bearing upon titles to Indian lands and rights therein, are to be distinguished from the case at bar, for the reason that the status of full citizenship and full ownership of property does not occur in any case heretofore presented.

United States v. *Rickert*, 188 U. S., 433;
Cherokee Nation v. *Hitchcock*, 187 U. S., 294;
Lone Wolf v. *Hitchcock*, 187 U. S., 553;
Choctaw Nation v. *United States*, 119 U. S., 1;
Stephens v. *Cherokee Nation*, 174 U. S., 445;
Taylor v. *Brown*, 147 U. S., 640;
Ex parte Savage, 158 Fed., 205;
Wiggan v. *Connolly*, 163 U. S., 56.

ARGUMENT.

1. Marchie Tiger and Marchie Tiger's ancestors were citizens of the United States.

Judge Pollock, in *Ex parte Savage*, 158 Fed., 205, states:

"Since the decision by the Supreme Court in the case *In re Heff*, 197 U. S., 488, 25 Sup. Ct., 506, 49 L. Ed., 848, it cannot be doubted, I think, under Act of Congress, Feb. 8, 1887, C. 119, 24 Stat., 388, when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all rights guaranteed to all citizens of such state, and are amenable to the criminal laws of the state, to the same extent, and in the same manner, as any other citizen of the state, and they are not amenable to the criminal laws of the United States sitting in such state, unless the offense charged against them be committed within territory over which the government has reserved exclusive jurisdiction to its courts."

The question was again before the Circuit Court of the United States for the Eastern District of Washington in *United States* v. *Saunders*, 96 Fed., 268, and that court again held that the Act of 1887 conferred full citizenship and discharged the Indian personally from the guardianship of the United States. This same question was again presented in the case of *United States* v. *Kopp*, 110 Fed., 160, and it was again held that the language of the statute meant what it said, and did, in fact, confer citizenship in the fullest sense of the word and

discharged the allottees from the personal guardianship of the United States. The question was then presented to the Circuit Court of Appeals for the Eighth Circuit in the case of *United States* v. *Farrell,* 110 Fed., 942. The court in that case, apparently with much misgiving as to the correctness of the rule, held to the qualified citizenship and the continuance of the guardianship over the person of the allottee. Finally, this question went to the Supreme Court of the United States in the case of *In re Heff,* 197 U. S., 488, and it was there contended by the attorney general that the Indian became only a qualified citizen by accepting an allotment under the provisions of the Act of 1887, that the personal guardianship was not discharged, and that the continuance of the tribal government was a sufficient justification for the assertation of guardianship on behalf of the United States. All three of these contentions were denied in language so emphatic and explicit and unmistakable that it is surprising that the contention should now be made that allottees are not citizens of the United States in the fullest sense; that the guardianship over the person of the Indian may be continued to be exercised without his consent or the consent of the state, or that the continuance of the tribal government of which the allottee was formerly a member, is a sufficient justification for depriving such allottee of the rights, privileges and immunities of a citizen of the United States.

No court, so far as we have been able to discover, since the decision in the *Heff case,* has held to the continuance of personal guardianship of such allottees.

In *Ex parte Viles,* 139 Fed., 68, the question was again before Judge Hanford. No doubt, it gave Judge Hanford much satisfaction to be able to quote the Supreme Court of the United States in support of the conclusions arrived at and announced by him in the case of *Ross* v. *Eells, supra.* He uses the following language with reference to the decision in the *Heff case*:

"I understand the decision of the Supreme Court in the *Heff case* as a broad declaration of fundamental principle—that Congress has no power by special legislation to classify citizens, so as to create race or other distinctions, and subject one class or grade of citizens to police regulations not applicable to all citizens, and incompatible with the reserved power of the states to enact and enforce valid local laws, and that when an individual has once acquired the rights and privileges of a citizen, and became subject to state laws, his status cannot be changed by an Act of Congress, without his *individual* consent and the concurrent assent of the state in which he resided."

In *United States* v. *Dooley,* 151 Fed., 697, Judge Whitson arrives at the same conclusion with reference to the effect of the Act of 1887 upon the personal guardianship of the allottee.

In the case of *United States* v. *Auger et al.,* 153 Fed., 671, the court arrived at the same conclusion.

In *Ex parte Savage,* 158 Fed., 205, Judge Pollock of the Kansas District uses the following language:

"Since the decision of the Supreme Court in the case *In re Heff* * * * it cannot be doubted, I think,

under Act of Congress, Feb. 8, 1887, when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside and are entitled to all the rights guaranteed to all citizens of such state."

In *United States* v. *Hall et al.*, 171 Fed., 214, Judge Quarles, district judge for the Eastern District of Wisconsin, held that "an allottee under the Act of 1887 became a citizen of the United States, with all the rights, privileges and immunities of such, and that he was not thereafterwards subject to the police control of the United States because of his Indian descent."

In *United States* v. *Boss*, 160 Fed., 132, Judge Marshall states the effect of the Heff decision in the following language:

"The effect of this provision was to make every Indian to whom an allotment of land had been made in conformity with the provisions of that act a citizen of the United States, and of necessity a citizen of the state in which he resided and subject to the laws thereof. *Matter of Heff*, 197 U. S., 488, 25 Sup. Ct., 506, 49 L. Ed., 848. The Statute of January 30, 1897, is a police regulation. If it is to apply within a state, it must be because of the status of the Indians for whose protection it was enacted, or of the *locus* of the forbidden act as being on a reservation.

"The Supreme Court of the United States determined in the case above cited that the dependent status of the Indian ceased by virtue of the Act of February 8, 1887, on the allotment of land in severalty to him, and

that thereafter his former condition of tutelage afforded no basis for police regulation by the national government within the boundaries of the state."

The effect of this citizenship was again before the Supreme Court of the United States in *Dick* v. *United States,* 208 U. S., 352. The Supreme Court of the United States uses the following language:

"The transaction out of which the present prosecution arose occurred, as we have seen, within the village of Culdasac, a municipal organization existing under and by virtue of the laws of Idaho, and the parties involved in it were Dick and Te-We-Talkt, who were at that time Indian allottees in severalty and holders of trust patents, and therefore, according to the decision in *Matter of Heff,* 197 U. S., 488, citizens of the United States. If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words, 'Indian country' to embrace any body of territory in which, at any time, the Indian title had been extinguished, and over the inhabitants of which (as was the case of Culdasac) the jurisdiction of the state, for all purposes of government, was full and complete. *Bates* v. *Clark,* 95 U. S., 204."

B. Marchie Tiger's ancestors owned these lands in fee simple absolute, subject only to the condition or limitation, contained in the grant, that the lands should not be alienated by them or their heirs before the expiration of five years from August 8, 1902.

Counsel for defendants in error feel warranted in saying that there is not a single case cited by plaintiff in error in his brief that supports his contention that the Government of the United States had the power, or authority, through the Congress to impose restrictions upon the lands involved in this suit, when the Act of April 26, 1906, was passed. In all of the cases cited by them it will be observed that the decisions were based upon the theory that Congress had not relinquished its right to the *lands* occupied by the Indians, or had not conferred upon them full citizenship.

In the case of *Taylor* v. *Brown*, 147 U. S., 640, the Supreme Court of the United States had under consideration the question of the right of Congress to impose restrictions in the grant by the United States to Thomas K. West, a Sioux Indian. The court speaking through Mr. Chief Justice Fuller said:

"The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain reasonable time may be valid, and the grantee forfeit his estate by violating it (1 Preston Estates, 477), and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage and entitled to special protection *Pickering* v. *Lomax*, 145 U. S., 310 (36:716); *Felix* v. *Patrick*, 145 U. S., 330 (36:725) yet the proviso in question may fairly be held to have been adopted in view of general principles. If, when the patent issued, June 15, 1880, West could have conveyed but for a specified restriction taking

effect at the same moment, then that date should be included in the period of five years prescribed. The proviso is that the title shall not be subject to alienation in the various ways described, and shall be and remain inalienable for a period of five years from the date of the patent. Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent and for five years after that date, two periods of time, but we are of opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. The limitation on alienation was to be and to remain, that is to say, the land was to be on the first day not subject to alienation, and so to remain until five years had expired. The protection of the Indian against the improvident disposition of his property was fully attained in the judgment of Congress by fixing the period of five years, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

"The power to alienate came with the patent and the restriction for the period named was carefully drawn to operate *eo instanti*, that is, to commence in its entirety coincidently with the possession of the power."

It will be observed that in this case the restriction was imposed in the grant by the government, and even then the Supreme Court seemed to be in doubt as to whether or not Congress had the power to impose the restrictions. And we do not conceive of any theory by which it can be held that Congress has that authority after the fee simple title has been conveyed. We at least feel warranted in saying that not in a single case has

the court held that Congress has the power to impose restrictions after a deed has been delivered to the grantee, conveying all the right, title and interest of the tribe and the United States to the individual. We do not know of a case where this question has been squarely presented to this or any other court.

In all the cases cited by appellant the decisions of the court were based upon the theory that citizenship not having been conferred the Indians were wards of the government, or that the title to the property conveyed passed under the provision of various treaties or acts which invested the United States with power to control the disposition of the lands by virtue of the legal title remaining in the United States in trust for the Indian.

C. It was not within the power of Congress to create a restriction or limitation, or to extend a restriction or limitation, affecting these lands, after conveyance to the allottees and the acceptance of the conveyance by the allottees, in fee simple, subject only to the definite restriction or limitation expressed in the grant.

We take the position that the Act of Congress of April 26, 1906, having the purpose in view of continuing the restrictions upon the lands of Indian allottees, who are citizens of the United States and to whom deeds had been executed and delivered, reciting that the United States and the Creek Nation conveyed all their right, title, and interest in and to said lands, subject only to the restrictions imposed by the Act of Congress approved

June 30, 1902, is not a valid exercise of legislative power of the government over the subject dealt with. And in this connection we do not think it out of place to quote the remarks of the Senator McCumber upon the discussion of this question. In the Congressional Record of February 6th and 7th, 1907, there appears a record of a lengthy debate in the Senate during which the power of Congress to extend the restrictions on allotments of Indians in the Indian Territory was fully discussed. The debate arose on a consideration by the Senate of a proposed clause of the Indian Appropriation Bill intended to repeal Section 19 of the Act of April 26, 1906. Section 19 is known as the McCumber Amendment after its author, Senator McCumber, of North Dakota. In the senate discussions he and Senator Curtis of Kansas were the only ardent supporters of its validity. Senators Stone, Long, Clark of Wyoming, Clapp, Tillman, Brandagee and others advocated its repeal on the ground that it was invalid and an injurious cloud on the title to the allotments, placing the allottee at a disadvantage in dealing with his land.

The position of Senators McCumber and Curtis, was that, although these Indians are citizens of the United States, they are still wards of the government, and that the government as their guardian chose the right to control the disposition of their lands, even to the extent of making it absolutely inalienable for twenty-five years.

The discussion in the senate was confined to Section 19 of the Act of April 26, 1906. The question

before the senate was whether or not Congress had the power to impose additional restrictions upon the allottees of the Five Civilized Tribes. If Section 22 of the same act is to be construed as imposing an additional restriction, viz., that the supervisory control by the Secretary of the Interior over the alienation of lands by full-blood heirs is to continue for an indefinite period, precisely the same principle is involved as was the subject of debate in the senate. The following quotations from the remarks of Mr. McCumber set forth his theory of the matter:

"This brings up again the same question that was discussed during the last session, as to the authority of Congress to extend the restrictions and also as to whether or not it is provident legislation. I do not think it will be necessary to go over the ground then gone over as to the question of our legal right in the premises. *It has been stated here, and I will admit that the Heff case seems to support that statement, that Congress had no power to impose further restrictions upon the alienation of lands granted to Indians. I do not think though, that whatever has been stated in the Heff case or in the Rickert case, can be said to be a precedent in a case involving the right or the authority of Congress to still deal with lands, with property, that has not passed out of the government of the United States and is still in the hands of certain members of Indian Tribes.*

"I want to show that the courts have made a distinction between the property rights and those which were purely of a civil or political nature, and the parallel I wish to draw is that in these cases nothing but the political rights have been granted, and that the govern-

ment has not, according to its own decision, withdrawn control over the Indians. I have construed the word "all" in the statute which declares these Indians to be citizens entitled to "all the rights, privileges and immunities of other citizens of the United States," to relate simply to civil and political rights.

"In none of these other cases (certain decisions of the United States Courts referred to by Mr. McCumber) was the issue directly involved as to whether or not the government could continue its relation over the property interest of the ward. It seems to me that it will very naturally follow that if the wardship continues, and it has always been regarded as a complete wardship, and the guardianship as a complete guardianship, over both the person and the property of the Indian; then, certainly, we can continue to restrict to a greater extent than at the time of the making of the grant. No one else can challenge it; no one but the government can continue it; no one but the government can take it away. * * * If these Indians are still the wards of the government, then, notwithstanding any grant that we have made, we have still the right to extend these limitations and also the right to take them away. The fact that they are our wards admits of no other theory than that we have control over both the person and the property, and if the granting them the mere right of citizenship destroys the relation of guardian and ward, then we have no right to pass more than 5 per cent of this entire bill that we are proposing to pass today. Assuming that we have the right to enact into law the other provisions of the bill, we have an equal right to enact into law this provision, or to continue this provision which we have placed in the bill of last year, which continued the restrictions for twenty-five years longer.

"The *crux* of the whole matter is whether we can or whether we cannot impose upon the Indians any other restrictions than those which existed at the time they became citizens of the United States, and at the time their lands were allotted to them in severalty. If the statement is true that they are still the wards of the government, then my opinion is that we can absolutely. So the question reaches back to the question whether they are still wards of the government.

"We are treating them as such in this bill from the beginning to end. * * * There is not a single page of it that does not recognize their condition as being one subservient to and under the control of the government. If the bill is legal from one end to the other, it must be upon the assumption of the theory of guardian and ward." * * *

Senator Curtis during the discussion in the Senate said:

"I maintain if Congress had placed the five year limitation in the act, and within the five years had discovered that a mistake had been made, then it would have been the right, so far as the Indian is concerned, to extend the time, because the government is the guardian of the Indian and has control of his property."

Senators McCumber and Curtis, then, rest their defense of the McCumber theory upon two propositions, which may be stated as a premise and a conclusion:

1. The government is the guardian of the Indians; therefore,

2. It controls their property, and may impose any

restrictions on the sale of the property that it sees fit or add to a restriction already imposed.

The argument of those senators who advocated the repeal of the McCumber amendment was, that the Indians were citizens of the United States; that they owned their lands absolutely, and that Congress had no power, after the allotments had been selected and accepted, subject to a five year restriction on alienation, to impose one for twenty-five years. Senator Clapp said:

"The discussion of the right of alienation and restriction upon alienation have always ignored one basic principle, which the court has not met yet, because it has never been presented to the court. A restriction upon alienation can only rest upon one of two conditions. It must be a limitation placed in the grant at the time of the grant; or it must be a limitation resting in the incapacity of the grantee to transact business, as the incapacity of coverture, infancy or lunacy. If the limitation is placed in that instrument by the grantor at the time the grant is made, clearly the grantee, accepting that instrument with that limitation upon his rights, the right of the grantor to make further limitations must be measured by the terms of that grant, and no one would contend that, after the grantor had made his grant, embodying in that grant the limitation, the grantor, at his own sweet will could add to the force, character, or extent of the limitation.

"Turning to the question of incapacity, Congress has passed laws, by virtue of which, when the Indian took his allotment he became a citizen of the United States as absolutely as any member of this body, with his rights as absolute, except that as to a particular piece

of land there was a limitation attached. The moment he became a citizen, carrying the parallel further, he attained his majority; and from that moment the guardian could exercise no further authority over him. There is the basic principle upon which this question must rest, and it has got to be met when it is finally presented to the court.

"I repeat, there would be no limitation except a limitation resting in the grant, made by the grantor and accepted by the grantee, or a limitation resting in the incapacity of the grantee himself; and when that period of incapacity is passed, when he attains his majority, the relation of guardian and ward as to that transaction must cease, and no limitation can then be imposed by the grantor.

"The Indian attains his majority at the moment he receives his allotment, and, attaining his majority, passes as to that subject beyond the control of the guardian. As to the United States and the allottee who has taken his allotment, there is no guardianship.

"That citizenship (citizenship of the United States, granted by the Act of 1901) was absolute and complete, so far as the person of the Indian was concerned. From that time on the United States was as powerless to interfere, for instance with the sale of liquor to that Indian as it would be to any white man. That individual has the right of suffrage. He has every right that pertains to a citizen. His property, however, a particular piece, and only a particular piece, is subjected to this trust which the government imposed at the time of the execution of the trust deed.

"In 1904, in the *Heff case*, the Supreme Court stood face to face with this question, and not in any academic sense. The court realized that if the control of the

Federal Government had ceased as to the right of the Indian, and especially in restraint of his appetite for strong drink, it was a serious problem; and with that confronting them, with that question brought to their attention, with the *Rickert case* forced upon their consideration by the Attorney General, the Supreme Court held in the *Heff case* that the Indian had become a citizen, and in the most important matter of guardianship which a superior and a higher people, morally developed, could exercise over an inferior people, on the question of their morals and habits as affected by the use of intoxicants, the Supreme Court had to admit that the United States Government had no control over that Indian, because he was a citizen of the United States. They point out in that opinion the difference between exercising a control over the Indian and the limitation that has been carved out of a grant, and they distinguish between the two.

"But in the light of the *Heff case*, Congress has no more jurisdiction over an Indian in the Indian Territory, than it has over any other citizen of the United States. It may still exercise that trust as to particular property which the Indian holds. It may still exercise its trust as to communal property which has not been disposed of. But as to the right of the Indian to deal with his own property and to exercise his rights there can be no question."

Senator Long of Kansas, said:

"The senator from North Dakota (Mr. McCumber) said that, in his opinion, there was some doubt as to the validity of the amendment (Sec. 19) which he had incorporated into the Five Tribes Act last year. I will state that, in the opinion of those who have given

consideration to the question in the Indian Territory, there is no doubt as to its invalidity. It is believed there that those Indians being citizens of the United States, Congress could not, in 1902, make agreements with them providing that the restrictions on the alienation of their lands would expire in the * * * Creek Nation in five years from July 1, 1902, and then in 1906, without the consent of the Indians extend the period of non-alienation for twenty-five years." * * *

In the Heff case, 197 U. S., 488, being the case referred to by Mr. McCumber in his statement. "It has been stated here, and I will admit that the *Heff case* seems to support that statement, that Congress has no power to impose further restrictions upon alienation of lands granted to Indians," Mr. Justice Brewer, who delivered the opinion of the court said:

"We are of the opinion that, when the United States grants the privilege of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual and the state, and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indians are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The opinion in this case contains a careful review of the legislation of Congress and decisions of the courts relating to the status of the Indian. Mr. Justice Brewer says:

"The relation between the government and the Indians and the rights and obligations consequent thereon have been the subject of frequent consideration by this court. * * * In a general way it may be said that the recognized relation between the government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former. In the early dealings of the government with the Indian Tribes the latter were recognized as possessing some of the attributes of nations, with which the former made treaties, and the policy of the government was, sometimes by treaties and sometimes by the use of force, to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal or tribal life.

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indian in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of

the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

"It may be well to notice some of the legislation of Congress having this end in view."

Mr. Justice Brewer then refers to the Act of March 3, 1893, giving the consent of the United States to the allotment of the lands of the Five Civilized Tribes, and creating the Dawes Commission to carry out the work. Other acts and treaties are mentioned, and Mr. Justice Brewer says:

"We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that *the policy of the government has changed, and that an effort is being made to relieve some of these Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the government the relation of guardian and ward.*"

On June 30, 1906, the Senate of the United States authorized the appointment of a select committee consisting of five senators under a Senate resolution as follows:

"Resolved, that a select committee consisting of five senators be appointed to fully investigate all matters connected with the condition of affairs in the Indian Territory in relation to legislation included in the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and

for other purposes, approved April 26, 1906, and kindred matters in said territory with reference to the Five Civilized Tribes. And that said committee be authorized to employ a stenographer to report its hearings and all necessary clerical assistance. And said committee is authorized to sit in the City of Washington and in the Indian Territory or elsewhere, as circumstances may demand, with power to send for persons and papers and to administer oaths, and shall make full and complete report, together with their conclusions and recommendations, to the Senate of the United States, on the first Monday in December, Anno Domini, nineteen hundred and six. The necessary expense of said committee shall be paid out of the contingent fund of the Senate.' "

Under said resolution the President of the Senate appointed said committee as follows: Senator C. D. Clark, of Wyoming, Chairman, Senator Chester L. Long, of Kansas, Senator Frank B. Brandegee, of Connecticut, Senator Henry M. Teller, of Colorado, and Senator William A. Clark, of Montana. The committee organized at Denver, Colorado, on August 10, 1906, and on November 12, 1906, met at Kansas City, Missouri, and at once proceeded to Indian Territory, where public hearings were held at Vinita, Muskogee, McAlester, Ardmore, Tulsa and Bartlesville.

In their report and recommendation to the Senate of the United States we find the following references and recommendation by said committee relative to the restrictions upon lands of the Five Civilized Tribes:

"By the Act of March 3, 1901, all Indians in Indian Territory were made citizens of the United States. The

Indian tribes had title to these lands by patents from the United States. These lands were occupied in common by the members of the respective tribes. By the Supplemental Agreements made in 1902 these Indians agreed to take their lands in severalty upon condition that they could alienate their allotments within a certain period, which differed in the several tribes. We believe that Congress might shorten this period and permit alienation at an earlier date.

"Congress, by the Act of April 21, 1904, removed the restrictions upon the alienation of all allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors, and except as to homesteads, and provided that restrictions upon the alienation of all other allottees, except minors, and except as to homesteads, might, with the approval of the Secretary of the Interior, be removed upon application to the Indian agent at the Union Agency.

"Section 19 of the Act of April 26, 1906, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes should have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the approval of that act, unless such restrictions, prior to the expiration of said period, shall be removed by Act of Congress.

"We believe that this last legislation was unwise, injurious to the Indian, and of no validity. Congress, after providing in the Supplemental Agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the Original Agreements. The effect of this legisla-

tion has already clouded, and, if unrepealed, will continue to cloud the title of much land in Indian Territory, and will result in endless litigation.

"It will prevent the Indians from obtaining a fair price for their lands, and has been and will continue to be a fruitful source of dishonest transactions.

"It will not prevent sales being made at the expiration of the periods designated in the Supplemental agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed." (Report of select committee to investigate matters connected with the affairs in Indian Territory, 1906, Vol. 1, page v.)

We believe that the report of this select committee is a correct enunciation of the law. Having had years of experience in passing legislation, and being themselves learned in law, and having given the subject under consideration many months of study, their unanimous decision as to the validity of the act in question is entitled to much more weight than the opinion of a majority of the Senate, who, by their votes represented themselves as favoring the validity of the bill, when, as we know, little thought or attention was given to the question of the validity of the act, except probably by its author, Mr. McCumber, who, we have shown in another part of this brief, was himself in great doubt as to the validity of the act; and admitted upon the floor of the Senate that a decision in favor of the validity of his amendment would be in conflict with the decision of the Supreme Court of the United States in the matter of *Heff, supra.*

In *Jones* v. *Meehan*, 175 U. S., 1, decided in 1898, three years after *Wiggan* v. *Connolly*, a tract of land in Minnesota was allotted to one Moose Dung, a member of the Cherokee tribe. There were no restrictions upon the right of Moose Dung to alienate or lease, * * * the court says:

"The reservation (of land to the Indian), unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or an Act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Moose Dung received his land in 1879. In 1891 he executed a lease to the plaintiff for ten years. In July, 1894, while the plaintiff's lease was still in effect, he executed a second lease, for twenty years, to the defendant, at a much larger consideration than was paid by the plaintiff. In August, 1894, Congress passed a joint resolution empowering the Secretary of the Interior "to approve, if in his discretion he deemed the same proper and advisable," this lease to the defendant. In December, 1894, the Secretary approved the defendant's lease.

The plaintiff brought suit to quiet title. The Circuit Court of the United States held that the lease of November 9, 1891, to the plaintiff was a valid and subsisting lease, and needed no approval by the Secretary of the Interior; that the lease made on July 20, 1894, to the defendant, and approved by the Secretary, was subordinate to the lease of the plaintiff, and, as against him,

conveyed no right to the use of the land; and that the plaintiff was entitled to have the rights and privileges under his lease vested and quieted in him as against the claims of the defendant.

The Supreme Court affirmed this decision. Mr. Justice Gray, who delivered the opinion, said:

"The land in controversy having been granted by the United States to Moose Dung, * * * passed by the lease executed in 1891 to the plaintiffs by the lease to them from the younger chief and their rights under that lease could not be divested by any subsequent action of the lessor, *of Congress*, or of the executive departments. * * * The Congressional resolution of 1894, and the subsequent proceedings in the Department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief" (the allottee).

This case denies the power of Congress to impose restrictions where none originally existed. By analogy, there is no power to add another restriction to the one originally imposed. The Creek lands, as allotted, were to be alienable in five years. Section 19 proposes, after four years of the five have expired, to add a new and additional period of inalienability. If Congress had no power to impose on Moose Dung the restriction that the lease by him should be approved by the Secretary of the Interior, surely it had no power to impose on Creek allottees the restriction that they may not sell their lands for a period of twenty-five years. This conclusion is the stronger if it is remembered that Moose Dung was not

a citizen of the United States, but was still a member of his tribe, and subject to the guardianship of the government, whereas, the Creek allottees are citizens, entitled to all the rights, privileges and immunities of such, and cannot, therefore, be set apart in a class separate from other citizens and subjected to special disabilities and restrictions.

If the broad language of the Heff case is followed these Indians are full-fledged citizens of the United States, and not its wards, and Section 19 cannot be supported on the guardianship theory. But if the guardianship contended by Mr. McCumber is admitted, the question then arises as to whether or not the act done by the guardian, i. e., the legislation of April, 1906, was within the power of the guardian to enact. We have seen that these allottees own their lands absolutely, having acquired by their allotment deeds all the interest of both the United States and the Creek Nation; that the only restriction imposed was that the lands should not be sold for five years; and that when the allottee accepted his allotment, subject to this restriction, his right to sell after it expired, that is, after five years, was vested. In view of these facts it is submitted that Section 22, if it imposed additional restrictions, is also invalid, and that all the allottees of the Creek Nation who had selected and received their allotments under the terms of the Supplemental Agreement, have had the power since the expiration of the five years, of disposing of their surplus lands, freely and without supervision of the Secretary, and were not deprived of that power by the Act of April 26,

1906. And the decision of the Supreme Court of the United States in the case of *Jones* v. *Meehan* supports this conclusion.

SECOND.

All other cases adjudicated by this court, bearing upon titles to Indian lands and rights therein, are to be distinguished from the case at bar, for the reason that the status of full citizenship and full ownership of property does not occur in any case heretofore presented.

There are cited in support of appellant's contention a number of cases in which the right of Congress to impose restrictions upon the theory of governmental control have been sustained by the higher courts. The chief of these cases is *United States* v. *Rickert*, 188 U. S., 433. (See plaintiff in error's Brief, page 25.) This case last referred to was based on Section 5 of the General Allotment Act (24 Stat., 388), which is as follows:

"That upon the approval of the allotments provided for in this act, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that, at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or

incumbrance whatsoever; provided, that the President of the United States may, in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

The case of the *United States* v. *Rickert, supra*, was a suit instituted in the name of the United States to restrain the collection of state taxes upon the improvements located upon lands allotted under the General Allotment Act of 1887; and certain personal property furnished by the United States and used in the cultivation of the lands of the allottees. This case turned principally upon the right acquired by the allottee under the General Allotment Act and the obligations assumed by the United States. Construing the provisions of the statute, that is, Section 5 of the General Allotment Act, Mr. Justice Harlan, speaking for the Supreme Court, uses the following language:

"The word 'patents,' where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing designed to show that for a period of twenty-five years the United States would hold the land allotted *in trust for the sole use and benefit of the allottee*, or, in case of his death, for his heirs, and subsequently at the expiration of that period—unless the time was extended by the President—convey

the fee, discharged of the trust and free of all charge or incumbrances. In other words, the United States retained the title, giving the Indian allottee a paper in writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine."

Another case relied upon by the plaintiff in error is the case of *Cherokee Nation* v. *Hitchcock*, 187 U. S., 249 (see page 25 of plaintiff in error's Brief).

The case of *Cherokee Nation* v. *Hitchcock* involves the authority of the Secretary of the Interior to lease tribal lands of the Cherokee Nation pursuant to and in accordance with an Act of Congress. The authority of the Secretary of the Interior to make such lease was sustained upon the ground that the land of the Cherokee Nation was public tribal property held by the Nation in its tribal capacity and that Congress is vested with authority to take measures to make the tribal property productive and to secure therefrom an income for the benefit of the tribe. In other words, Congress was simply dealing with the tribal relation and the tribal property, and not with the individual citizen of the United States and his individual property.

Another case relied upon by the plaintiff in error is the case of *Lone Wolf* v. *Hitchcock*, 187 U. S., 553 (see plaintiff in error's brief, page 25). This was a suit to restrain the allotment of lands of members of the Kiowa and Comanche Tribe of Indians, on the ground that the Secretary was proceeding under an Act of Congress in violation of the previous treaty made with the tribes; that their lands should not be allotted until a majority of all the members of the tribes had voted therefor. It was further insisted that a majority of the tribes had not so voted and that the United States had amended the treaty after its ratification by the Indians, without their knowledge or consent. The Kiowa and Comanche Indians were not located in the Indian Territory; were not citizens of the United States and the property involved was the tribal property. The relief sought by the Indians was denied.

We quote as follows from the case (p. 567):

"The Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands are concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States*, 119 U. S., and *Stephens* v. *Cherokee Nation*, 174 U. S., 445."

So far as we have been able to discover, the first time there was presented to a United States Court the contention that the Act of 1887, declaring Indian allottees to be citizens of the United States, with all the rights, privileges and immunities of such, conferred only a quali-

fied citizenship and did not destroy the Federal guardianship, is the case of *Ross* v. *Eells,* 56 Fed., 855. Judge Hanford in that case denied the doctrine of qualified citizenship and the continuance of the Federal guardianship and asserted that the Act of Congress accomplished the purpose indicated by the plain and unambiguous language used. Subsequently, his decision was reversed in the case of *Eells* v. *Ross,* 64 Fed., 417, by the Circuit Court of Appeals for the Ninth Circuit.

In *Wiggan* v. *Connolly,* 163 U. S., 56 (cited by plaintiff in error in his Brief, p. 67), decided in 1895, a treaty between the United States and the Ottawa Indians, ratified July 16, 1862, provided that at the expiration of five years from the ratification of the treaty, that is, on July 16, 1867, the Ottawas should become citizens of the United States, and their tribal organization should be dissolved; that each citizen of the tribe should receive an allotment of land; and that these allotments should be inalienable until the allottees became citizens of the United States. In other words, each allottee might sell after July 16, 1867.

Subsequently, by a *second treaty,* the time at which citizenship in the United States should be attained by the Indians was extended or postponed two years, or until July 16, 1869, and it was provided that patents in fee simple, giving the right to sell without restriction, should be granted to all allottees under the treaty of 1862 who had become of age. As, under the original treaty both minors and adults received deeds entitling

them to sell after July 16, 1867, this second treaty imposed an additional restriction on the alienability of lands patented to minors—that is, the restriction of minority.

On December 1, 1865, while the first treaty was in force, a patent was issued to Esther Wilson, a minor eight years old. In 1872, while she was still a minor, her guardian, under order of the court, executed a deed conveying her land to the defendant, Wiggan. Esther Wilson after attaining her majority, brought suit for possession of the lands; she then died and the suit was continued by her heirs.

It was held that the heirs were entitled to recover the land. The material part of the decision is as follows:

"The provision (of the second treaty) in reference to patents must be considered as superseding those of the treaty of 1862. And by its terms patents were to issue to the heads of families and to all among the allottees coming of age, in the language of the treaty, 'so that they may sell their lands without restriction.' It does not appear that the allottee in this case was the head of a family, and, according to the testimony, she was a minor. This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor allottee, that is, the limit of minority. * * * The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the *consent of the tribe*, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could

agree for still further protection, a protection which no individual was at liberty to challange.

"It follows, therefore, that at the time of the assumed power of the guardian of Esther Wilson to dispose of her realty such realty was inalienable, and the deed made by the guardian, conveyed no title."

Mr. McCumber referred to this case as "along the line" of the question before the Senate, but admitted that it was not "on all fours." It is submitted that there are two important differences: first, Esther Wilson was not a citizen of the United States when she received her patent, and was not to become a citizen until July 16, 1867, or, by the second treaty, until July 16, 1869, whereas, every Creek Indian became a citizen on March 1, 1901, which was before any patents had been issued to the Creeks; and, second, the additional restriction of minority was imposed on Esther Wilson with the consent of her tribe, while the restriction of Section 19 is imposed by Congress alone, and on adults without the consent of either the tribe or the allottee.

Wiggan v. *Connolly*, then stands for the proposition that Congress *and* any Indian tribe may, acting together, through a treaty, impose a new restriction on the alienation of land held by a member of the tribe, not a citizen of the United States. It certainly is no authority for the contention that Congress has the power, alone, to impose an additional restriction on a citizen of the United States owning his property in fee simple.

Although there is nothing in the record to show that the Act of April 26, 1906 (34 Stat. L., 137), was adopted by action of the legislative branch of the Creek Nation, counsel for plaintiff in error have inserted in their brief (pages 70, 71 and 72) an act passed by the House of Kings and the House of Warriors, approved by P. Porter, Principal Chief, on August 3, 1907, and approved by the President of the United States, September 17, 1907. This action was probably taken in pursuance of the provision of Section 28 of the Act of April 26, 1906, which provided:

> "Section 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity *until* approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

Section 42 of the Original Agreement, made with the Creek Nation and ratified in 1901, is as follows:

> "No act, ordinance, or resolution of the National Council of the Creek Nation in any manner affecting the lands of the tribe, or of individuals

> after allotment, or the moneys or other property of the tribe, or of the citizens thereof, except appropriations for the necessary incidental and salaried expenses of the Creek government as herein limited, shall be of any validity until approved by the President of the United States. When any such act, ordinance or resolution shall be passed by said council and approved by the principal chief, a true and correct copy thereof, duly certified, shall be immediately transmitted to the President, who shall, within thirty days after received by him, approve or disapprove the same. If disapproved, it shall be so indorsed and returned to the principal chief; if approved, the approval shall be indorsed thereon, and it shall be published in at least two newspapers having a *bona fide* circulation in the Creek Nation."

Counsel for plaintiff in error state (page 73, L. 1) that this action on the part of the tribe was not provided for in the Act of Congress relative to the extension of restrictions. As a matter of fact, it is a section of the same act but has no bearing on the case at bar for the reason that it did not have any force or validity prior to the execution and delivery of the conveyances from Marchie Tiger to the defendant in error; that is, the conveyances were all executed and delivered during the month of August, 1907, while the action taken by the legislature of the Creek Nation was not approved by the President of the United States, as provided for in the act of the National Council, until September 17, 1907.

We respectfully urge that if the court is to take judicial notice of this action taken by the legislature of the Creek Nation, it cannot be given any virtue as adding anything to the enactment by Congress, and if it could it came too late. We do not consider that this transcendent

farce enacted by the *effete* National Council of the Creek Nation is entitled to any consideration in view of the fact that all the members of the tribes were citizens of the United States.

The land in controversy was allotted to the deceased relatives of the plaintiff in error, and conveyed to them by patent duly executed, issued and delivered to them prior to their death. The law in force at that time definitely provided for certain restrictions against alienation. They and their heirs under the Supplemental Agreement, and under the terms of the grant, to-wit, the patents executed and delivered to them, had the right to alienate this land on and after August 8, 1907. This was a vested right. It was a property right, and the effort thereafterwards made by the grantors, the Creek Nation and the United States, to restrict that vested right, was inconsistent with the grant, and incompatible with the right acquired by the deceased and their heirs, under the grant.

Impair means to make worse, to lessen the power, to weaken, to deteriorate.

The Constitution of the United States had been put in force in the Indian Territory by Act of Congress passed long before the Act of April 26, 1906. That act, in so far as it undertook to restrict the vested rights to alienate on and after August 8, 1907, interfered with the vested property rights, and is inconsistent and incompatible with the estate granted.

Mandelbaum v. *McDonell*, 18 Am. Rep., 61 (Mich.);

Gladney v. *Gudnor*, 95 Am. St. Rep., 517, 524 (Mo.);
Bruce v. *Strickland*, 81 N. C., 267;
Westervelt v. *Gregg*, 62 Am. Dec., 160;
Spreckles v. *Spreckles*, 58 Am. St. Rep., 170, 177 (Cal.);
Reade v. *De Lea*, 95 Pac., 131 (N. M.).

RECAPITULATION.

I.

We insist that the Act of Congress approved April 26, 1906, does not either expressly or by implication undertake to extend restrictions against alienation of inherited lands by full-blood heirs in the Creek Nation.

II.

That the provisions of said Act of Congress, in so far as the same undertake to extend the restrictions against alienation by full-blood allottees, conflict with vested rights as protected by the Fifth Amendment to the Constitution of the United States.

We therefore respectfully insist that the decision and decree of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

MARCHIE TIGER, **Plaintiff in Error.** **vs.** **THE WESTERN INVESTMENT COMPANY, ELLIS H. HAMMETT, R. C. ALLEN and J. C. PINSON. co-partners under the firm name of COWETA REALTY COMPANY,** **Defendants in Error.**	**No. 60.**

IN ERROR TO THE SUPREME COURT OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The purpose of this reply is to review briefly the argument and position assumed by the defendants in error, and to refer to a few matters and authorities not contained in our original brief.

Plaintiff in error attempted, in what has preceded, to show by the legislation of Congress that the purpose had been to protect, in a greater degree than had been done in the separate agreements with the Five Civilized Tribes, the full blood Indians of all those tribes, and that the purpose so to do was manifest when all the legislation, bearing

upon the subject, is considered as one system; and that such legislation, if construed liberally and in the interest of the Indian, will protect the full bloods in all their holdings of tribal lands and thus carry out the legislative plan. Allotment agreements were made with all the five tribes, except one in the year 1902; those with the Cherokees, Choctaws, and Chickasaws about July 1st, 1902, and that with the Creeks, June 30th of the same year, the Seminole agreement having been concluded in 1898. It will be seen in a reference to these agreements that the period of five years had originally been fixed for the expiration of restrictions upon the allotted lands generally, with exceptions in some instances of homesteads and the lands of minors. In the Choctaw and Chickasaw nations provision had been made in the agreements for the gradual removal of restrictions, that is, for their removal from a part of the lands at one time and a part at another; and had there been no change inaugurated by Congress in reference to these matters, there would have been a vast amount of land belonging to the Indians on which restrictions would have expired in the summer of 1907, and this would have included much land belonging to full blood Indians.

This exact situation was staring Congress in the face when the Act of April 26th, 1906, was passed, and this act, it can reasonably be said, grew out of the necessity, as it appeared to Congress, of throwing additional safeguards around full blood Indians. The error that had been made when the agreements were entered into of permitting restrictions to be so soon removed from the lands of this class of Indians, became apparent and as said by this Court in United States vs. Celestine, 215 U. S., 278, in reference to the Act of May 8th, 1906, ex-

tending the time at which allottees should be subject to State laws under the general allotment Act of 1887, it "is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty." So it may be said here that the Act of April 26th, 1906, now under consideration, is worthy of note as suggesting that Congress in permitting restrictions to expire upon the lands of full blood Indians at the time fixed in the various agreements had been hasty, and that the interest of those Indians demanded that additional legislation in the way of further protection to that class of Indians was imperatively demanded. It is evident, too, that the new Act was designed as a modification of and substitution for all previous legislation affecting the subject in any way in conflict with the Act. It was doubtless intended that the late Act should supersede, unify and bring into a harmonious whole all previous agreements with the various tribes, affecting this class of Indians. This is evident from a statement made by Senator Clapp, chairman of the Senate committee on Indian affairs, in his report upon the bill and explanation of its provisions made in the Senate, as evidenced by the following language:

> "Under the laws and treaties down there, the different tribes would, before this bill passes, come into the right of alienation by degrees—some of them in one year, some of them in two years. There were different rules, but we brushed that all aside and adopted this plan."
>
> (40 Cong. Rec., p. 5174.)

HISTORICAL INTERPRETATION.

Something has been said in the brief of defendants in error in regard to the change which took place in Section 19 of the Act of April, 1906, in its progress through the two branches of Congress, to which we will give attention later, but we desire to suggest here that the section as it finally passed carries upon its face unmistakable evidence that Congress considered the full blood Indian incapacitated to deal with the white man concerning his own property without the supervision of the Government. The idea conveyed by the language and form of the statute is not that Congress had in mind a particular tract of land as an original allotment or as an inheritance, but that it had in mind the incapacity of a class of Indians. The language of the Act is leveled directly at the fact of his incompetency. The language is as follows:

> "That no full blood Indian of the Choctaw, Chickashaw, Cherokee or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act unless such restrictions shall prior to the expiration of said period be removed by Act of Congress."

As the very language of the Act strikes down the power of the full blood Indian to alienate, etc., and as the purpose was to restrain the exercise of such power by full blood Indians, it may well be concluded that the term "lands allotted to him" was used by Congress in a generic sense and was intended to

comprehend all allotted tribal lands owned by him which would, of course, include lands inherited by him. Unless this is true, then a class of lands coming wholly within the reason of the law and under the general purpose of the Act is not within that particular section of the Act. That the disability of the full blood Indian as a class was the subject uppermost in the mind of Congress when it was passed and that Congress was not considering the question of imposing further restrictions upon a part of the lands of full bloods and permitting them to expire upon another part, is evident by what was said at the time the matter was under discussion in the Senate. In answer to a question by Senator Money, Senator McCumber said:

> "Mr. President, the Senator can not see but that there is some scheme in this; that somebody is getting something out of it. I am responsible on this floor for that amendment (referring to Sec. 19). It had not been suggested to me by any person upon the face of the earth, only as I have become acquainted with the Indians, and as I have become more and more impressed, especially since I have been in Congress, by an almost systematic effort to rob the full-blood and every other Indian of all the property that he may have.
>
> The Senator states that the Indian is doomed. Perhaps he is. I admit that finally he is; but I insist that it is the duty of Congress to protect him and shield him just as long as it can. I go a step further and say, if we have made any treaty or any agreement which we have since found to be inimical to the interests of the Indians, it is our moral duty to reject that agreement; it is our moral duty to pass a law that will protect him against the rapacity of the white settler. Whether that settler will get that land away from the Indian, even though we put

a restriction of twenty-five years against alienation, I am not prepared to say. However, I do not believe that, if you do continue that restriction, the Indian is going to be thrown a pauper upon the Government so long as that restriction continues. I do believe, however, aye, I know it, that the moment you remove those restrictions you have got a pauper to deal with, and to deal with him as you will. Any man who knows anything about the Indian's character—any man who knows the history of the Indians for the last fifty or seventy-five years—will not deny the fact that that is going to be the result.

Mr. President, the question arises as to what is the condition of those Indians in the Indian Territory. I will not attempt to speak with absolute certainty as to what will be the final decision of the Supreme Court with respect to what rights the Indian has obtained by reason of citizenship and what he has forfeited by reason of citizenship. I do know that so far as our treaties are concerned the Supreme Court has again and again held that so long as we can deal with the Indians we are under no obligation to maintain the condition that we create by any one treaty or agreement. * * *"

(40 Cong. Rec., p. 5175-5176.)

After referring to several decisions of this Court in regard to the right of Congress to deal with the property of the Indian after allotment, the Senator proceeded as follows:

"If that is true, it seems to me there is ground for holding that we ought to protect them; and I say again to the Senator, you can talk all you are a mind to about civilizing the Indians the same as you would a white man—by making him get down and work himself up, but he never will do it. You can take a white man, and he may be a pauper, and that may be for his best interest, because it places him upon his own responsibility. But you must

remember that he has an inheritance of thousands of years which has given him the energy, the determination, the industrial character to build himself up. The exact opposite has been the history of the red-man; and because he has those characteristics we may never hope to make him the equal of the white man. If we will admit that, and proceed to make the very best Indian we can out of him, and observe our moral duty, remembering that we have stolen the continent from him—if we do our duty and continue his poor life as long as we can, we will always provide a home for him; give him a home upon terms under which he can not sell it, so that he can come back to it whenever he finds that there is no other place on the face of the earth to lay his head.

Mr. President, that is the spirit which backs the introduction of this amendment, and it is the only spirit that has controlled in seeking to make this amendment a law by passing it through both Houses of Congress, in order to protect the Indians, in the future at least, for as many years as possible."

By Senator Money:

"Mr. President, I give full credit to the zeal and humanity of the Senator from North Dakota (Mr. McCumber), and I especially indorse and cordially approve all the latter part of his remarks. I think he has stated the truth about the matter with great force and with great clearness and with great eloquence. I have already given both committees credit for doing what they think is best for the Indians." * * *

(40 Cong. Rec., p. 5176.)

This entire discussion was with reference to the provision of Section 19 of the Act of 1906, commonly known as the "McCumber Amendment," which had reference specially and exclusively to full blood Indians as a class and their disability as a class, not a

word being said in the entire discussion about any particular quantity of land allotted directly or inherited allotments. As the discussion continued, Senator Teller said:

> "If we can protect these Indian lands longer, we ought to do it. Whether we can add anything to what has already been done, whether, when the Government has given a patent, subject to a limitation of ten years, we can add another ten years, or five years, is a question I think we will probably leave to the courts to determine. It would be a good thing for the Indians if we could do it. Whether we can or not I am not prepared to say."
>
> (Vol. 40, p. 5177.)

Senator Spooner said:

> "I understood the Senator the other day to say that there were a great many Indians down there, not full bloods, who were as capable as white men of transacting business and protecting themselves."

Senator Teller:

> "Undoubtedly."

Senator Spooner:

> "I understood him also to say that there were some thousands of Indians who were not full bloods who were not capable of protecting themselves and taking care of their interests."

Senator Teller:

> "Undoubtedly that is true."

Senator Spooner:

> "I thought, upon that statement, that, providing it could be lawfully done, the restrictions to be imposed upon any nation should be left subject to the discretion of the Secretary of the Interior in order that those who were fit might be relieved, without at the same time subjecting

the large number who were not fit to spoliation."

(Vol. 40, p. 5177.)

As the discussion proceeded, Senator Teller said further:

"Mr. President, I wish to say just a word. The Senator from Wisconsin has referred to the fact that I said some of the full bloods were capable. **I do not think, taking the full bloods as a rule, that they are capable.** (Black type ours.) Neither do I think the half-breeds are capable. But there are a great many Indians, who have a little Indian blood, who are very capable."

(Vol. 40, p. 5177.)

On another day when the same question as to the full blood Indian was under consideration, Mr. McCumber said:

"Mr. President, we have but these few remnants of the people left, and I confess that my sentiment joins with my sense of justice in announcing that there is a duty upon the Government of the United States to protect those few remnants of full-blood Indians in the Indian Territory of it is possible to do so." * * *

'The Indian is improvident. I never saw one yet—a full-blood Indian I am speaking of now—who had any property which could be sold that a white man could not obtain in six months for one-half of its value, if he stayed by him long enough and tried to impress him with the necessity of selling it. Whenever we have given the Indian the right to sell his land, he has sold it. Not only that, but I am informed to-day by some of the best authority from the Indian Territory that for a bottle of whiskey up to $5.00 there are hundreds of thousands of claims that have been already sold subject to the possibility that Congress might ratify those previous sales.' * * *

'Now, Mr. President, we have passed the kind

of laws I have stated. I think we have made treaties with the Seminoles that there shall be no restrictions on some of their lands. So have treaties been made with others that the restriction shall expire within a certain time; with still others that it shall expire in a little longer time; with still others that it shall remain for twenty-one years, I think. So there are several different laws fixing restrictions upon the sale of their lands which shall be allotted to them.

'In a great many instances they have attempted to sell the lands, whether homestead or otherwise, despite the restrictions, and for almost nothing. Can we not say with almost absolute certainty that if you give them the power of sale, within a few months all of the property will be transferred from the Indian to white settlers, and transferred for whatever the white settler sees fit to give them?'' * * *

(Vol. 40, p. 3345-3346.)

Again, Senator McCumber said:

''Mr. President, I do not quite understand, I fear, the full purport of the argument of the Senator from Missouri (Mr. Stone). If it means anything—and I know that it does—it simply means in effect that one of the rights of citizenship acquired by the Indians is the right to have all of his property taken from him by the white population without any further protection of the Government.

The Senator, as I understand, when he said there were 95 per cent of those people as capable as those in any other community of taking care of their property, referred only to the mixed bloods, and not to the full blood Indians. If I am in error the Senator can correct me.''

Senator Stone:

''I said, or meant to say, that from the information I have, perhaps there were 15 to 20 per cent of Indians of the full blood and mixed blood who, it might be said, were not competent.''

Senator McCumber:

"There are about 24,000, I think, of the full bloods left. **Of those 24,000 it is probably true that not 2 per cent of them would be capable of holding their own property and protecting it against the wiles of the white men, and it is for the benefit of those full blood Indians that I have introduced the amendment. It does not affect any of the others.**" (Black type ours.)

Senator Stone:

"The Senator says that not more than 2 per cent of the 24,000 of those full blood Indians are capable of managing their own affairs. I think that is a pretty strong statement."

Senator McCumber:

"I think it is not quite strong enough."

* * *

"I base my statement, Mr. President, first, upon a pretty intimate acquaintance with full blood Indians themselves. Almost ever since I can remember I have been acquainted with the Indians, with their characteristics, and have had a good deal of dealing with them, and have seen their dealings with white people. Taking my own acquaintance and observation wherever I have seen them have any business relations with white men, and taking the testimony which was given before the committee, which was to the effect that the full blood Indians down in the Indian Territory did not differ materially in their character for indigence from the full blood Indians anywhere else, I think I can safely say that almost 90 per cent of them would not be able to withstand the onset of the white civilization to get possession of their property. If that is true—and I think everyone who knows anything about the Indian character will agree with me that it is true—we come right back to the question whether or not it is our duty and whether we are not in conscience obligated to

protect those Indians by such means as are necessary to protect them." * * *
(Vol. 40, p. 3347.)

If the Act under consideration, considered in connection with prior and subsequent acts, affecting the same subject, does not conclusively show that Congress was dealing only with the question of the disability of full blood Indians and their incompetency to manage their own property, the discussion of the question in the Senate would certainly make it conclusive that that was the controlling subject in the legislative mind. Nor can an utterance be found from a member of either house, so far as we are able to ascertain, to the effect that there was any purpose to limit the protection thrown about the full blood Indian to any part of his property which may have been derived from the tribal estate; and so we must again insist that if it be true that under the law passed this class of Indians can only be protected as to directly allotted lands and not as to tribal lands owned by them through inheritance, then it must be said that Congress, with the full knowledge of the incompetency of the full blood Indian, has deliberately left him in a situation to become the easy victim of the rapacity of the white man with whose methods Congress seemed to be so familiar and against which it proclaimed its desire to protect him. No reason can be assigned, we repeat, why the full blood Indian is any more competent to providently handle his inherited land than he is to handle his direct allotment, and this fact brings both classes of lands equally within the reason of the law. Congress cannot have attributed to it the purpose of making a provision of law under which an incompetent person, under its protection, would be permitted to squander his estate.

POSITION OF DEFENDANTS IN ERROR.

Counsel for defendants in error, while not denying that Congress has expressly declared the incapacity of the full blood Indian, nevertheless, assert in substance that it was the congressional purpose to protect the full blood Indian in his ownership of a part of his property, but to let him deal with the other part as he may choose and thereby acquire an experience in business affairs that would make him a more valuable citizen. Such a proposition is ridiculous upon the very face of it and cannot be reconciled with any theory of the Indians' best interest or any rational purpose on the part of Congress. They say, too, that this is evident because of the fact that in numerous instances, especially among mixed blood Indians, Congress has provided that a part of the lands of the mixed blood shall be inalienable while other portions of his land may be alienated at his will; and this class of legislation is suggested as analogous to the legislation under consideration according to their construction of it. This argument, we think, wholly misconceives the policy of the legislation affecting mixed bloods in which they are required to hold a part of their lands for a time and permitted to alienate another part without supervision for the reason, that the latter legislation proceeds upon the theory that the mixed blood Indian is competent to deal with his lands on his own account either as to a part or as to all his lands; but that it is best for the Indian to retain a given part of his holdings for a certain period of time in order that he may have a fixed abiding place and thereby a

better opportunity to acquire the habits of industry and frugality; and that although competent to providently dispose of his lands, it is in his interest and in the interest of the policy of the Government for him to become experienced in individual ownership of property and have a permanent abiding place. Laws of this character, therefore, proceed upon an entirely different principle from the statutes under consideration with reference wholly to full blood Indians, because in the one case the Indian is declared to be competent and in the other he is declared to be incompetent.

It is suggested, also, that it was not the purpose of Congress that the Indian should have a large amount of land and that is assigned as a reason why the full blood Indian was permtited to sell or give away his inherited land. This argument is unsound for this reason: If Congress had not intended that an Indian should have the benefit of more land than his direct allotment, why did it provide a law of inheritance at all? All enrolled Indians of the tribe, children included, received allotments in equal amount. If Congress thought such amount was enough for any one Indian to own and as much as he was entitled to the benefits of, why did it provide for lineal and collateral inheritance? The fact that it did so provide is a complete answer to the argument advanced, that Congress never intended that the Indian should enjoy the benefits of more than his original allotment. Had Congress intended any such a limitation on the amount that any one Indian should be entitled to have the benefits of, it could easily have provided that the lands allotted to any Indian on his death should become a part of the surplus property of the tribe or escheat to the Govern-

ment or State, instead of descending to heirs under the laws of Arkansas. The fact is the tribal lands all belonged to the members of the tribe. Those lands were guaranteed to them in the early treaty in which they accepted them in exchange for the lands owned by them East of the Mississippi river, and it cannot, therefore, be assumed that Congress ever intended that any part of them should become a sacrifice to "experience" in dealing with the white man. The suggestion of that folly comes from the same white man.

This law does not prevent the alienation of inherited lands of full blood Indians. It only prevents their sacrifice. Such lands may all be sold under the law, but with regard for the Indian's interest.

Counsel for defendants in error have professed not to be able to understand how any particular significance can be attached to Section 23 of the Act of April 26th, 1906. We think the Court will not experience the same difficulty, but that it will be seen at once that Section 23 is one step in the progress of Congress toward a uniform plan for the protection of the full blood Indians of all the Five Tribes. It shows, we think, that Congress attempted to protect this class of Indians against any possible form of alienation without supervision. Section 23 was understood to be for this purpose, according to the declaration and announcement to the members of the lower house of Congress by Mr. Curtis, the author of the bill, when he made his report upon same, as found in Volume 40, Cong. Rec., on page 1231, and where, after explaining the purpose of several features of the bill, this statement was made by him:

> "The Bill further provides that any Indian may make a will, because under the terms of

agreement the courts in the Indian Territory, as I am informed, have held that an Indian in the Territory has no right to dispose of his property by Will. The Section added to the Bill, 23, provides that they make Wills, and that the Will of a full blood shall be acknowledged before a United States Judge or before a United States Commissioner. **Your Committee deem such a provision necessary in order to fully protect the interest of the full bloods.**" * * *
(Black type ours.)

NO UNIFORMITY UNDER THEN EXISTING LAWS.

We think upon the consideration of all the legislation affecting this subject in connection with the character of the subject dealt with in the Act of April 26th, 1906, it will be concluded by the Court that Congress intended and attempted to establish a uniform rule as to the protection of the full blood Indians of all the Five tribes. Prior to this Act much confusion as well as a total lack of uniformity prevailed as will be seen by a reference to the various allotment acts.

In the Choctaw and Chickasaw nations the allotment of full blood Indians descended subject to the restriction that the land should not be sold for less than the appraised value during the existence of the tribal government.

Under the Seminole agreement inherited lands did not become alienable until after the issue of a patent.

In the Cherokee nation the homestead descended under Section 13 of that agreement free from all restrictions upon alienation; and the surplus allotment in the latter nation was alienable on the expiration of five years from the date of the ratification of the agreement, August 12th, 1902.

In Section 16 of the Choctaw-Chickasaw agreement, allotments, excepting homesteads, could be alienated as follows: One-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years, all from date of patent, with the provision that it should not be alienated for less than its appraised value during the existence of the tribal government. The homesteads of the Choc-

taws and Chickasaws were inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment.

Under the Creek Agreement restrictions expired upon all surplus lands, five years after the ratification of the agreement, and proclamation by the President, making the date at which it would become alienable August 8th, 1907.

The statutes containing the agreements and provisions on these matters affecting the several tribes, are as follows:

Cherokee, 32 Stat., 717;
Choctaw & Chickasaw, 32 Stat., 641, 643;
Creek, 32 Stat., 500;
Seminole, 30 Stat., 567, 568.

A comparison of these statutes with the Act of April 26th, 1906, discloses a most striking change in the policy of Congress. It will be seen from the earlier statutes that little, if any attention or consideration was given to the question of the degree of blood as affecting the period of restrictions. The earlier enactments all proceeded upon the assumption, apparently, that all the Indians would be competent to sell their property without supervision on the expiration of the period of restrictions fixed by those acts, the five-year restriction having the most general application, while an examination of the Act of April 26th, 1906, makes it equally clear that the protection of full blood Indians as a class was practically the single and sole purpose of Congress. Restrictions on some of the full blood lands had expired prior to the Act of 1906, and Congress had doubtless full knowledge of the consequences resulting to the Indian where that situation existed. The discussion of the bill in the Senate contained refer-

ence to a special committee report on the situation. It is likewise evident that Congress considered the status of the full blood Indian of all the tribes about the same relative to his incompetency to deal in his lands, and that the variation as to his rights in that regard, found in the previous statutes, had no legitimate basis; and that this class of Indians could be better protected under a law having a uniform application to all the tribes. It was this state of affairs that called for the explanation of Senator Clapp, chairman of the committee, when he stated:

> "Under the laws and treaties down there, the different tribes would, before this bill passes, come into the right of alienation by degrees—some of them in one year, some of them in two years. There were different rules; **but we brushed that all aside and adopted this plan.**" (Black type ours.)
>
> 40 Cong. Rec., p. 5174.)

CHANGES IN THE WORDING OF SECTION 19 IN ITS PASSAGE THROUGH CONGRESS.

Undue importance has been attached by defendants in error to the fact that some changes were made in the language of Section 19 between the time of its introduction in the house and its final passage. Under the circumstances and considering the large number of subjects dealt with in the bill and the final change made, treating of some of the subjects first embodied in Section 19 in other sections of the Act, the matter upon which they rely is, in our opinion, not significant. Section 19, as first introduced, contained the provision for the removal of restrictions upon all Indian allottees of the Five Tribes except Indians of full blood and except minors, and with the exception of homesteads; and also for the removal of restrictions upon allottees who were full bloods except minors and except as to homesteads upon the approval of the Secretary of the Interior under rules, etc. The section read:

> "That all the restrictions upon the alienation of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, except Indians of full blood and except minors, are, except as to homesteads," hereby removed, and all restrictions upon the alienation of lands of allottees of said tribes who are full blood Indians, except minors and except as to 'homesteads,' may be removed by the Secretary of the Interior under such rules and regulations as he may prescribe, but the removal of the restrictions upon alienation shall not in any manner affect leases, and for the purpose of this section the quantum of Indian blood

possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. Full blood Indian allottees of said tribes may alienate any of the lands allotted to them, except homesteads, with the consent and approval of the Secretary of the Interior, and not otherwise, and all laws or parts of laws inconsistent with the provisions of this section are hereby repealed: **Provided,** That the lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

(40 Cong. Rec., p. 1260.)

The bill as originally introduced contained Section 22 in the following terms:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the County in which said minor or minors may reside, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

(40 Con. Rec., p. 1264.)

The last clause of Section 22 as then introduced made all conveyances subject to the approval of the

Secretary of the Interior under rules, etc. This was amended by limiting the supervision of the section to conveyances made "by heirs who are full blood Indians or minors." In discussing the last sentence of this section, and in explanation of the provisions of the bill, Mr. Curtis said:

> "The last part of the section retains in the hands of the Secretary of the Interior the control of the property belonging to full bloods, because in other sections of the bill we have reserved to the Secretary control of the land owned by full blood Indians, and the last Section only applies to full blood Indians and full blood minors."
>
> (40 Cong. Rec., p. 1265.)

At this stage of the legislation Section 19 contained provisions for the removal of restrictions from Indians of every degree of blood with certain safeguards and restrictions as to a part of the lands of full blood Indians and minors and with provisions for the removal of restrictions as to full bloods under rules of the Secretary, etc.; but when the bill reached the Senate two entirely new features were injected into it in an amendment offered by Senator McCumber providing for an extension of restrictions on the lands of all full bloods for a term of twenty-five years, and depriving the Secretary of the Interior of the right to remove restrictions. This amendment is in the following words:

> "That all restrictions upon alienations and leasing of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of less than full blood are, except as to homesteads, hereby removed; that no full blo Indian of any of said tribes or his full blood heirs, shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands

allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period be removed by act of Congress."

(40 Cong. Rec., p. 3273.)

The first sentence of the McCumber amendment, as will be seen, limits the restriction removal feature to Indians of less than full blood.

In the conference report of March 16, 1906 (Report 2347, p. 5 and 6), and likewise the report of March 19th, 1906 (Senate document 2697, p. 5 and 6), Section 19 still contains the first clause providing for the removal of restrictions on the lands of Indians of less than full blood. Subsequently, however, the section was modified in the Senate by striking out the first clause relative to the removal of restrictions so that the section read "That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, etc., etc., which is the form in which the section was adopted. (40 Congress Rec., p. 4992.)

At the time this last amendment was made Section 22 of the Act also had taken its present form because of the amendment offered by Senator Curtis, as subsequently slightly modified by omitting the reference to minors.

Now, when it is considered that when this Act was voted on in its final form by both houses that Section 19 made no provision whatever for the removal of restrictions, but became a provision for the extension of restrictions on the entire class of full blood Indians, and when it is considered that Section 22 was the only provision dealing with the removal of restrictions and that that section in the last sentence thereof provided fully for the protection of full blood

Indian heirs, adult or minor, by requiring that sales made by them should be approved by the Secretary of the Interior and that both provisions of the bill as finally passed were before Congress in that form, it cannot be said with any plausibility that Congress did not intend that all these provisions should be effective. All provisions for alienation were finally encompassed in Section 22, and the terms upon which alienation by heirs can be made are all found in Section 22 and the limitation placed by that section upon alienation by heirs who are full bloods must, we think, be construed to have a general application throughout all the tribes to alienations made by such heirs. No other construction is consistent with the unity of plan evidently contemplated by Congress. Section 19 was intended to extend restrictions generally upon full bloods of all the tribes. Section 22 is intended to provide the rule under which inherited lands may be alienated throughout all the tribes and among Indians of whatever degree of blood, with the special safeguard in the last sentence as to alienation by full blood heirs; and it applies to all lands under restrictions at the date of enactment.

As previously pointed out, restrictions expired under the Creek Supplemental Agreement August 8th, 1907. The Act of April 26, 1906, went into effect approximately fifteen months prior to that date. Now, counsel for defendants in error admit that between April 26th, 1906, and August 8th, 1907, that alienation of land by a full blood heir must be made in accordance with the provisions of the last sentence of Section 22. In other words, they concede, as we understand them, that that provision of Section 22 became operative for that limited period; but they say that it ceased to operate on August 8th, 1907, and that it was only intended by Congress to provide a

rule of alienation until the latter date. What is there in the entire Act or in the situation that Congress was dealing with that gives any support whatever to this theory? Where can anything be found in the nature of the subject dealt with and in the manifest intention of Congress that suggests any such theory of the limited operation of this provision as to time. An examination of the statutes and agreements made between the Government and the various tribes as to the time in which restrictions would expire throughout the various tribes will show that a very large percentage of the inherited lands of full bloods would have been freed from restrictions some time in the summer of 1907 but for this Act of 1906. Now, if a construction is to be given to the Act under which restrictions on inherited lands are to still expire, as provided in the first acts and agreements, it would have to be concluded that the Act has fallen very far short of affording that protection to the full blood Indians generally, which seems to have been the intention of its framers, as appears not only from the Act itself but from what they said at the time concerning it. Had it been the purpose of the framers of Section 22 to give it that effect, it would have been most easy and the most natural thing for them to have prefixed to the last sentence in Section 22 the following words: **Until restrictions expire under existing law** "all conveyances made by heirs who are full bloods," etc.; but, the fact that they placed no limitation whatever upon the period that the last sentence of Section 22 should be operative, makes it evident that they intended no such limitation and that its operation continues until the disability of full blood Indians to alienate their land, as provided in Section 19, shall have been removed by Act of Congress.

It is true that Section 19, according to the first amendment offered by Senator McCumber, contained the expression that no full blood Indian, etc., "or his full blood heirs" shall have power to alienate, etc., but it is likewise true that at that time Section 19 contained a provision for the removal of restrictions; but, it will be seen that the subjects first embraced in the amendment were divided and the feature relative to removing restrictions was placed in Section 22, thus leaving in Section 19 only the provision for the extension of restrictions as to full blood Indians generally and fixing their disqualification to alienate their lands; and as Section 22 as passed contained all the provisions of the Act, removing restrictions, and as the lands of full blood Indian heirs became alienable thereunder upon the condition expressed in the last sentence of the section; that is, upon the approval of the Secretary, the words "or his full blood heirs" could then be omitted from Section 19, and Sections 19 and 22 taken together would still provide a disqualification of the full blood Indian to alienate his lands for a period of twenty-five years unless sooner changed by Congress, and also permit a full blood heir to alienate inherited lands as provided in the last clause of Section 22. The two sections taken together and construed together, would, therefore, contain definite and specific provisions as to the following subjects:

1st. The legal status of full blood Indians of all the tribes as to their power to alienate their lands derived from the tribal estate.

2nd. The right of mixed blood Indian heirs throughout all the tribes to dispose of inherited lands with provision as to minors.

3rd. The conditions under which Indian heirs,

who are full bloods, might alienate their inherited lands.

Under this interpretation of the law none of the subjects under consideration by Congress or contemplated in the Act are left unprovided for, but a comprehensive rule is established embracing all the subjects and applicable to all the tribes.

It is contended in effect by counsel for defendants in error that Sections 19 and 22 cannot be considered together as forming one plan, because the sections are separated by two other sections of the Act. We submit that there is no merit in this contention, as will be seen when the subjects in the intervening sections, 20 and 21, are considered. Section 20, immediately following Section 19, which disqualifies the full bloods to alienate their lands, provides the terms under which their surplus lands may be leased, that is, with the approval of the Secretary of the Interior, making void all leases without such approval; also for the leasing of lands of minors and for the recording of leases.

Section 21 provides for the disposition of lands of Indians who die intestate without heirs, etc. Section 20 is a restrictive statute and naturally and logically follows Section 19; and Section 21 deals with a subject necessary to be provided for and one not foreign in any sense, as it makes provision for the disposition of the lands of intestate decedents. The subjects considered in these two sections are followed then by Section 22, removing restrictions from inherited lands of allottees generally, and fixing the condition of alienation by full blood heirs, all of which is followed by Section 23, restricting the power of a full blood to make free disposition of his lands by will without the approval of the Secretary.

We, therefore, have five sections dealing with subjects and phases of the same subject of such a character that it cannot be said with any force that the mere order of the sections have any significance whatever; nor do we believe it can be said that any different order and arrangement of the sections would be suggested by the construction and meaning contended for by plaintiff in error.

For convenience of reference we again set out the sections under consideration in full. They are as follows:

> "Sec. 19. That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations; Provided, further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely

because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

"Sec. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, for full blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"Sec. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus funds, but if the death of such allottee be not known by the Secretary of the

Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed."

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That

no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

(34 Stat., 137.)

LEGISLATIVE CONSTRUCTION.

We give also below, Sections 8 and 9 of the Act of May 27th, 1908, which we again contend were enacted upon the theory that the above provisions of the Act of 1906 have the construction contended for by us. They furnish the legislative interpretation of the prior Act. The latter two sections are as follows:

> "Sec. 8. That section twenty-three of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words 'or a judge of a county court of the State of Oklahoma.'"
>
> "Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such

allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this Act, are hereby made applicable to all wills executed under this section."

(35 Stat., p. 312.)

As said by this Court in Cope vs. Cope, 137 U. S., p. 682:

> "These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones;" citing U. S. v. Freeman, 3rd Howard, 556.

And also by Southerland on Statutory Construction, paragraph 283:

> "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in **pari materia**, are treated prospectively, and construed together, as though they constituted one Act. This is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared; harmonized, if possible; and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate

> together, so far as possible, consistently with the evident intent of the latest enactment."
>
> (2nd Ed., Sec. 443.)

It thus appears that both the historical and legislative interpretations of the Act of 1906 give it one and the same purpose and application.

Sections 19 and 22 superseded and supplanted Section 16 of the Supplemental Agreement on the subjects embraced in those two sections. Said Section 16 of the Supplemental Agreement reads as follows:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior; etc., etc."

The above section superseded and displaced Section 7 of the original Creek Agreement, approved by Congress March 1st, 1901. Sections 19 and 22 dealt with the subjects of full bloods; the inherited lands of mixed bloods, adults and minors; and the inherited lands of full bloods, and superseded Section 16 of the Supplemental Agreement as to those subjects. Under Section 16, as already pointed out, the Indians were not classified as to their competency. The Act of 1906 recognized the necessity of a classification in that regard and of provisions adapted to the different classes. Sections 19 and 22 were designed to accomplish that result, and in so doing necessarily superseded and supplanted anything to the contrary found in Section 16, and a construction of Section 22 which would leave it inoperative by

the revival of a provision in a statute, which it had superseded as to the same subject, would be far-fetched indeed. Yet that is exactly the position of defendants in error. They concede that Section 22 furnished the rule under which full blood heirs could alienate between the time of its adoption and August 8th, 1907, when restrictions under Section 16 of the Supplemental Agreement expired; but that thereafter the last clause of Section 22 became inoperative, and the provisions of the supplanted statute again became the rule under which rights are to be determined. There is nothing in the section nor in the general purpose which gave rise to it that will justify any such a theory.

If we are correct in the view taken of these statutes, then the expression "under this provision," found in the last sentence of Section 22, could not have the significance contended for by defendants in error, because the right of the Secretary to remove restrictions from any lands, as provided in Section 16 of the Supplemental Agreement, is taken away by Section 19 of the Act of 1906 as to full blood Indians, and the right of mixed blood Indians to alienate inherited lands is provided in Section 22 of the Act of 1906; and the same section, that is, the last sentence thereof provides the method by which full blood heirs may alienate their lands. The provisions are, therefore, complete for all purposes in the Act of 1906, and in Section 22 thereof, and all conveyances made thereafter by the classes of Indians designated, until otherwise provided by Congress, would of necessity be made "under this provision," and not otherwise after its adoption.

ACT OF 1906 NOT IN DEROGATION OF COMMON RIGHT.

It is contended further that the statutes in question, that is, Sections 19 and 22, likewise Sections 8 and 9 of the Act of 1908, are in derogation of common right and, therefore, are to be strictly construed. Let us briefly examine this objection. In the first place who is in a position to take advantage of an objection to a statute on that ground? Can it be done by a stranger to the operation and effect of the statute? Or would it not rather have to be done by the person affected thereby upon the theory of the hardship imposed by the statute? Who is objecting to this statute on that or any other ground? It is certainly not the plaintiff in error or his tribe of Indians. It is not objected to by any other tribe of Indians affected, so far as we are advised. The statutes have the support of the Department of the Interior charged with the care of Indian affairs. This is evidenced in the approval, by the President, of the Act of the Creek National Council, which authorized the prosecution of this writ of error. They likewise have the support of the Department of Justice, as that department has appeared in the case because of the general interest of the Government in the application and validity of the Act as affecting all the tribes. The plaintiff in error is invoking the aid of the court in order that he may have the protection and the benefits of the statute, not to relieve himself from any burden thereof. The tribe of which he is a member have officially, through their National Council, ratified and approved the Act of 1906

and all the provisions thereof now relied upon by plaintiff in error. The National Attorney of the Creek tribe, of which plaintiff in error is a member, appears as one of the counsel in this case, all because of the interest of that tribe in the questions involved and in the construction of the statutes contended for by plaintiff in error.

Who is complaining? No one directly affected by the operation of the statute; only the speculator in Indian lands; not even the farmer or homeseeker, as they would not object to a sale under approval by the Secretary or other authorized authority, as they expect to pay the reasonable value of property. But the objection comes wholly and solely from that class of persons who desire an opportunity to deal with the full blood Indian standing alone in his almost helpless condition because of lack of knowledge of business affairs and of the value of property. The objection is from the class of white men, who understand this situation of the Indian and desire the opportunity to negotiate with him for his property on the basis of the white man's superior business sagacity. So, when this objection is analyzed and reduced down, it is found that the "right" which is being violated is not, after all, the Indian's right.

THE FIFTH AMENDMENT TO THE CONSTITUTION.

It is asserted again, not by plaintiff in error, not by his tribe, but by third parties, attempting to acquire his lands, that he is a citizen of the United States and of the State of Oklahoma and, therefore, this legislation is in contravention of the fifth amendment to the Constitution declaring that "no person shall be deprived of life, liberty or property without due process of law." Just what relation citizenship has to this constitutional guaranty we do not clearly see; nor is it clear, from this legislation, that any one having a right to object is being deprived of any of the rights protected by the amendment; but if so, being a citizen of the United States would probably not be a condition of the defense of that right. There are thousands of persons in this country who are not citizens and much property is owned here by that class; and it is not conceivable that they could be deprived of life, liberty or such property without due process of law although not citizens. Such a course would not only violate the fifth amendment, but would likewise be abhorrent to the principles of free institutions.

It seems to us that defendants in error are laboring under a confusion of ideas both as to the effect of citizenship on the subject and as to the proposition that these statutes are depriving the persons affected of rights of some character. The Government and the Indian both assume that restrictions upon the sale of the property of a full blood Indian and the approval of the sale by such an Indian by the Government is a protection and a benefit to the In-

dian. They are the two interested parties in agreements and legislation of that character and both are satisfied therewith. The white man on the other hand, or that class of white men desiring the opportunities of trade with the Indian, assumes on the contrary that any restriction of trade in Indian property is a burden to the Indian and a violation of some right which is asserted for him. This fundamental difference in the premises reckoned from is the chief source of the entire controversy. We do not, however, feel called upon here to enter into an extensive defense of the position of the Government and the Indian upon this question. If the third party, charged with no responsibility to protect the Indian's interest, has any right to object to the relation of the Indian and the Government, with which both the latter are satisfied, it can at least be said that the objection comes rather late and that upon such objection a policy, quite as old as our constitutional history, will hardly be changed as long as still deemed necessary in the governmental process of winding up the affairs of the Tribes.

CITIZENSHIP OF THE INDIAN DOES NOT AFFECT THE RIGHT OF THE GOVERNMENT TO PROTECT HIS PROPERTY.

If we have been able to read the authorities correctly then one of the questions which has frequently arisen in dealing with Indian matters has been settled by the courts, and by a long line of adjudication put beyond further controversy, unless the question is to be reopened for consideration anew, and that is, that the conferring of citizenship upon an Indian and subjecting him to the police authorities of the State where he resides does not deprive the Government of the right and power to still legislate concerning his property and as it deems best for his general protection. We shall nevertheless briefly refer to some adjudication on the subject. One of the early cases in which this question was squarely presented was decided sixteen years ago by the Circuit Court of Appeals of the Eighth Circuit and we quote from the opinion in that case as follows:

> "We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges and immunities of citizens, while it retained, for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real estate, and to withhold from

the donee for a season the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it."

Beck vs. Flournoy Live Stock Co., 65 Fed., l. c. 35.

This language was quoted and approved in Goodrum vs. Buffalo, 162 Fed., decided twelve years later, by the same Circuit Court of Appeals, at page 822.

In Cherokee Nation vs. Hitchcock, 187 U. S., l. c. 307-308, this court through Mr. Justice White uses the following language:

> "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the Act of 1898 has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States vs. Rickert, 188 U. S., l. c. 437, the controversy as to the right of a State to tax

certain property belonging to an Indian living on an allotment made under the Act of 1887, which Indian was a citizen of the United States and a citizen of the State of South Dakota, was before the court. In the latter case the court speaking through Mr. Justice Harlan says:

> "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the Agreement of 1889, ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship."

A restriction against alienation upon the land for a given period is designed to accomplish precisely the same purpose that is accomplished by the United States holding the land in trust, and preserves to the Government the same power which it has when acting as trustee.

As said in United States vs. Allen, (C. C. A.), 8th Circuit, 179 Fed., l. c. 17,

> "Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the Government for the period of 25 years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with

such a restriction as would prevent the main reliance of the Government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the Government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other; etc., etc."

The court then refers to the decision in United States vs. Rickert, 188 U. S. 432 above, and shows that the decision in the Rickert case did not turn upon the fact that the Government held the land as trustee but upon the broader ground of the power of the Government to enforce its policies of protecting the Indian in the enjoyment of his property.

On the effect of citizenship upon the right of the Government to maintain its policy, the same court (l. c. 19 and 20) uses the following language:

"Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the Heff case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in United States v. Celestine, 215 U. S., 278, lends no support to the defendants. * * *

The grant of citizenship to the members of the Five Nations was intended for their protection, and not to strip them of the protection of the national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised, to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the State of their residence, this court still said in

the case of United States v. Thurston Co., 143 Fed. (C.C.A.), 287-288: 'Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race.' Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language."

In United States vs. Celestine, 215 U. S., l. c. 290-291, the court says:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no

> denial of the personal jurisdiction of the United States."

This doctrine finds support also in the case of United States vs. Sutton, 215 United States, 291.

The opinions in the above cases refer approvingly to decisions of the 8th Circuit Court of Appeals, found in United States vs. Mullin, 71 Fed., 632; and Rainbow vs. Young, 161 Fed., 835, in which the same principles are announced.

The decision in the Heff case, so much relied upon whenever the authority of the Government is questioned, cannot now in view of the decision of the Celestine case above be considered an authority against the right of the Government even to exercise a police authority over the Indian allottee in a State where such authority has not been heretofore specifically relinquished, and the doctrine of the Heff case never did question the power of the Government to deal with the property of an Indian citizen on which restrictions were maintained or where the same was held in trust. As said in McKay vs. Kalyton, 234 U. S., l. c. 467, in an opinion by Mr. Justice White:

> "Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision in the matter of Heff, 197 U. S., 488, dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the State of which they had become citizens."

We, therefore, submit that no authority can be found where the right of the Government to exercise such jurisdiction as it may deem necessary over the property of an Indian allottee although a citizen

of the United States and of the State where he resides has been denied; but that in every instance where this question has been presented to this or the inferior courts in whatever form it may have assumed and under varying circumstances, it has been uniformly ruled that the mere question of citizenship did not affect the question of the Government's right; and although it were concluded that the Indians of the Five Civilized Tribes have been entirely subjected to the police authorities of the State of Oklahoma, and that the Government has relinquished any right to exercise such authority over them, that fact alone would, nevertheless, not deprive the Government of its power of supervision or guardianship, if it may be so termed, over the property of the Indian, derived from the tribal estate. The authority over the person may be relinquished and the authority over the property maintained, as said in United States vs. Hall, 171 Fed., l. c. 218:

> "Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other the management of his estate. We have seen it has been settled that the Government may at any time terminate this relation of guardianship. It follows, therefore, it may at its pleasure emancipate the Indian from personal control and still retain the other function of managing and conserving his property. That the emancipation of the Indian from further Federal control was the purpose of Congress is so plain from the language employed in the Act of 1887 that no argument could make it plainer. The purpose of the Government to protect the title of allotted lands has been declared with equal distinctness."

CONSTITUTIONALITY OF THE ACT.

No valid reason has been assigned why this Act is not within the legitimate exercise of the power of Congress in the premises. The sum of the argument against the constitutionality is that the Indian is a citizen of the United States, and that he holds his land in fee simple. The question cannot be affected by the fact that he is a citizen of the State of Oklahoma because on the date of the passage of the Act, Oklahoma was not a State and the Indian, at that time, sustained his tribal relation, lived upon or owned an allotment carved out of the reservation located in a territory under the exclusive jurisdiction of the United States. The objection on the ground of his citizenship, as fully appears from the preceding authorities, cannot be maintained; and if holding the title to his allotment deprives Congress of the power exercised, the objection could, with equal force, apply to the power of Congress to deal with the tribal property where the title to same is vested in the tribe; and this would challenge the validity of a policy of the Government resting on more than a century of legislative and executive usage. Where the Indian is still a member of his tribe, and the Government maintains restrictions and conditions upon his allotment, Congress, it would seem on principle, would have equally as much right to legislate concerning that property as it would to legislate concerning tribal property, owned by the tribe without the power of alienation or disposition. The right in both instances proceeds from the authority which the Government has assumed to exercise for the protection of the Indian. From whatever source that authority may emanate, the right of its exercise has been sus-

tained by this court from the beginning. The broad ground on the question of this power, announced in United States v. Kagima, 118 U. S., *l. c.* 384, in an opinion by Mr. Justice Miller, which has been so many times since referred to and reiterated by this court, is amply sufficient for all the purposes of this case. In that case it was said:

> "The power of the general Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The court at time, and in earlier and later decisions, did not deem it necessary to vaguely assert the power to exercise this authority under the clause of the Constitution relative to the government of the territory belonging to the United States, or, under the clause giving Congress the power to regulate commerce with the Indian tribes.

A power so long exercised will not be deemed abandoned by mere implication or construction.

A restriction upon the alienation of the land of an Indian, imposed by Congress, is an agency for the exercise of a Federal power. And, so long as the restriction remains, the power may be exercised in the manner and to the extent deemed best by Congress.

Wigan v. Connolly, 163 U. S., p. 60, cited on the brief, is an authority directly in point on principle, as to the right of extension and modification of restrictions. United States v. Celestine, 215 U. S. 278, above, is likewise in point as to that right. In the latter case the statute of May 8th, 1906, modifying

the allotment Act of 1887, as to the status of the Indian is referred to with approval. The Act of 1887 conferred citizenship upon all Indians accepting allotments and subjected them to the police authorities of the State where resident. The Act of May 8th, 1906, withdrew them from the operation of that provision until the expiration of the trust period, thereby directly depriving them of the privileges, if such they be, of being subject "to the laws both civil and criminal of the State or Territory in which they reside." In the Celestine case the court says:

> "The Act of May 8th, 1906 (c. 2348, 34 Stat. 182), extending to the expiration of the trust period, the time when the allottee of the Act of 1887 should be subject to State laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty."

This indicates most clearly that if Congress believed it had been hasty it had the undoubted right to correct the error.

Congress has exercised and continued to exercise the power of legislating for the benefit of the Indian and concerning his property rights from the beginning until the Act of May 27th, 1908. This power, we think, will continue until the jurisdiction over the subject is specifically relinquished. This has not yet been done.

Respectfully submitted,

W. L STURDEVANT,
Solicitor for Plaintiff in Error;

M. L. MOTT,
National Attorney for Creek Nation,

AND

W. A. BRIGHAM.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 515

MARCHIE TIGER, Plaintiff in Error,

vs.

THE WESTERN INVESTMENT COMPANY AND ELLIS H. HAMMETT, R. C. ALLEN, AND J. C. PINSON, Co-partners Under the Name of Coweta Realty Company, Defendants in Error.

In error to the Supreme Court of the State of Oklahoma.

STATEMENT OF FACT.

Plaintiff in error, Marchie Tiger, is a full-blood Indian and a member of the Creek Tribe of Indians, and duly enrolled as such upon the official roll of membership of the said tribe. The Creek Tribe of Indians is one of the tribes commonly known as the "Five Civilized Tribes," which for many years occupied

their respective reservations in the Indian Territory which now forms a part of the present State of Oklahoma and which, prior to the admission of said state into the Union, was commonly known as the "Indian Country."

By virtue of an Act of Congress of May, 1830, and a treaty entered into in pursuance thereof concluded on the 13th day of February, 1833, the Creek Tribe of Indians became the owners of a large tract of land in the then Indian Territory, which they received in exchange under the terms of said treaty for lands then owned by them in the state of Georgia; and their title to this tract was evidenced by a patent issued and delivered by the United States, conveying the same to them, bearing date August 11, 1852. The habendum clause of this patent is as follows:

> "To have and to hold the same unto the said tribe of Indians, so long as they shall exist as a Nation and continue to occupy the country hereby conveyed to them."

This tract or country was occupied by said tribe or Nation from the time they arrived upon and took possession of same in pursuance of the Act of Congress and treaty aforesaid, until the partition of said lands and their allotment in severalty to the members of said tribe in pursuance of agreements between the government of the United States and said tribe, and Acts of Congress mentioned below.

On March 8th, 1900, an agreement was concluded between the government of the United States and said tribe of Indians providing for the allotment of all of said lands to the individual members of the tribe, and by an Act of Congress approved March 1st, 1901, said agreement was enacted into law, with modifications, and the said Act of Congress ratified by the Creek National Council May 25th, 1901, (31 Stat. 861), said Act of Congress being commonly known as the "Creek Agreement."

Subsequently another agreement was entered into between the United States and said tribe containing certain modifications and supplementary provisions, which were enacted into law by Act of Congress approved June 30th, 1902, and likewise duly ratified by the Creek National Council, which Act is commonly known as the "Supplemental Creek Agreement" (32 *Stat.* 500).

With these agreements and Acts of Congress the negotiations between the government and the tribe providing for the allotment of the tribal lands were finally concluded.

CONCEDED FACTS.

Under and in pursuance of the provisions of the said agreements and Acts of Congress the allotment to plaintiff in error, and the allotments involved in this case, were made as follows:

1. The East half of the Southwest quarter and the Northwest quarter of the Southeast quarter of Section Twenty-five (25), Township Eighteen (18), North, Range Sixteen (16) East in the Creek Nation, Indian Territory, by deed, dated November 17th, 1903.

To Marchie Tiger, Plaintiff in Error.

2. The Southeast quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16) East, by deed, dated 6th day of May, 1903, to Martha Tiger, a full-blood Creek Indian and member of said tribe, and a sister of Marchie Tiger, plaintiff in error.

3. The Southwest quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16), East, by deed bearing date April 3, 1903, to Sam Tiger, a full-blood Indian and a member of the Creek Tribe, and a brother of the said Marchie Tiger, plaintiff in error.

4. The Northwest quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16), East, by a deed bearing date May 6th, 1903, to Lydia Tiger, a full-blood Indian and member of the Creek Tribe, and also a sister of the said plaintiff in error.

5. The Southwest quarter of Section Fifteen (15), Township Eighteen (18), North, Range Sixteen (16) East, by deed bearing date April 3rd, 1903, to Louisa Tiger, a full-blood In-

dian and member of the Creek Tribe, and also a sister of the said plaintiff in error.

Each of said allotments was evidenced by deed, executed by the Principal Chief of the Creek Nation, and approved by the Secretary of the Interior as required by law, and delivered to and accepted by said allottees, respectively, each allotment containing 160 acres of the tribal lands.

The four persons last named, to-wit: Sam, Martha, Lydia and Louisa Tiger, died during the year 1903, and plaintiff in error, Marchie Tiger, was the sole and only heir at law of each of the said decedents, and according to the law of descent and distribution of real property, then in force in said territory, succeeded and acquired title to the lands allotted to the decedents as aforesaid. (*Chapter 49, Mansfield's Digest of the Statutes of Arkansas*).

By stipulation of counsel in the lower Court, it was agreed that the four tracts of land last above described only are in controversy in this action.

Plaintiff in error is a full-blood Indian and duly enrolled as a full-blood and citizen of the Creek Tribe.

On August 8th, 1907, plaintiff in error sold and conveyed by warranty deed to the defendant in error, Western Investment Company, the allotments and lands above described, inherited by him from Sam and Martha Tiger, for the sum of $2,000.00, which consideration was paid.

On July 1st, 1907, plaintiff in error, sold and conveyed by warranty deed to defendant in error, Coweta Realty Company, the allotments and lands of Lydia and Louisa Tiger as above described; that he likewise on each of the following dates: July 26th, 1907, August 8th, 1907, and August 13th, 1907, sold and conveyed by deed, same property to said defendant in error,

Coweta Realty Company, the full consideration for all of such conveyances being $3,000.00, of which $558.00 has been paid.

At the time of the execution of each of the above conveyances, plaintiff in error was over twenty-one (21) years of age.

Each of the above mentioned conveyances was made and executed by plaintiff in error *without the approval of the Secretary of the Interior.*

Also, plaintiff in error offered to return to defendant, Coweta Realty Company, the sum of $558, full amount received from it, and made a tender thereof, which was refused; and offered to return to the Western Investment Company the sum of $2,000, the amount received from it, and made a tender thereof which was refused.

Said lands all lie in Wagoner county, Oklahoma, and are a part of the tract and country acquired by the Creek Tribe from the government of the United States as aforesaid.

(*Transcript of record, pp.* 18 *and* 19).

THE PLEADINGS.

The plaintiff in error commenced his action originally by complaint in equity in the United States Court for the Western District of Indian Territory, sitting at Muskogee, on the 11th day of September, 1907. He alleged in said complaint the facts pertaining to the sale by him of the tracts of land inherited from the four allottees as aforesaid to the defendants in error, pleading tender and tendering the amounts received therefor, etc. He alleged the illegality of all the transfers made, on the ground that the same were in violation of restrictions upon the alienation of the said lands, existing by virtue of certain agreements and Acts of Congress, more specifically referred to hereinafter. He alleged specifically that he had been deprived of rights and benefits guaranteed to him under certain Acts of Congress which prevented the alienation of said lands without the approval of the Secretary of the Interior; and alleged that all of said conveyances were made without such approval, and that he had no capacity to so make the same, and that the deeds of conveyance were therefore void. He asked to have the deeds cancelled and the clouds upon his title, created thereby, removed.

These allegations, in so far as they seek to invalidate the conveyances in question, were all controverted by the answers of the defendants, and the validity of the conveyances asserted.

The law fixing the standard value of an allotment and the quantum of land that each citizen should receive is found in Section 3 of the original Creek agreement and Act of Congress approved March 2, 1901, and is as follows:

> "There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard

value of an allotment, and shall be the measure for the equalization of values;" etc.

We now call attention to certain provisions of the Acts of Congress relative to the restrictions imposed upon these lands by Congress and direct special attention to the uniformity of this legislation as regards the manifest attempt and purpose of Congress to protect the lands of full-blood Indians as such attempt and purpose appear in the letter of the various Acts; and in doing this we take the liberty of italicizing portions of the various statutes.

The first provision of law applicable here is found in Section 7 of the original Creek agreement, embodied in the Act of Congress, approved March 1st, 1901, which reads as follows:

> "Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands *shall not be alienable* by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, *except with the approval of the Secretary of the Interior.*" (31 *Stat.*, 861).

The above provision was slightly modified by Section 16 of the supplemental Creek agreement, which was enacted into law by Act of Congress, approved June 30th, 1902, and which reads as follows:

> "Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation *nor be alienated by the allottee or his heirs* before the expiration of five years from the date of the approval of this supplemental agreement, *except with the approval of the Secretary of the Interior.*" (32 *Stat.* 500).

Section 6 of the said supplemental agreement, approved June 30th, 1902, as aforesaid, contains a further provision as follows:

> "The provisions of the Act of Congress approved March 1, 1901, (31 *Stat. L.*, 861) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of *Mansfield's Digest of the Statutes of Arkansas* now in force in Indian Territory; Provided, *That only citizens of the Creek Nation, male and female, and their Creek descendents shall inherit lands of the Creek Nation*: And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to *non-citizen heirs in the order named in said Chapter* 49."

The provisions of *Chapter* 49 *of Mansfield's Digest of the Statutes of Arkansas* relative to the descent and distribution of real estate so far as applicable here provides that real estate shall descend as follows:

> First. "To children, or their descendants, in equal parts.
>
> Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.
>
> Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

The tribal government of the Creek Nation is still in existence and operative within the limitations prescribed by law as evidenced by the joint resolution of Congress approved March 2, 1906, which reads as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." (34 *Stat.* 822).

The Union Agency and Commission to the Five Civilized Tribes were, when the Act of April 26, 1906, was passed, maintained by the government and the affairs of the tribes are still unsettled.

The Act of June 30th, 1902, above, was ratified by the Creek National Counsel on July 26th, 1902, and proclaimed by the President on August 8th, 1902; and under its terms, in the absence of subsequent legislation, the five year restriction upon the alienation of all allotments would have expired on August 8th, 1907; but prior to that date no sale or incumbrance or transfer of any character could have been made without the approval of the Secretary of the Interior.

Subsequently, however, and before the expiration of the said five years, Congress passed an Act, approved April 26, 1906, (34 *Stat.* 137), Section 19, of which provides among other things as follows:

"That no *full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act*, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided,

however, *That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior;* * * * * *"*

Section 20 of the same Act is as follows:

Sec. 20. "That after the approval of this Act *all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval*: Provided, That allotments of minors and incompetents may be rented or leased under orders of the proper Court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Section 22 of the said last Act of Congress contains the further provision:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such Court may upon petition filed by guardian. *All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."*

And, Section 23 of the same Act contains, also, the further provision:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner.*" (34 *Stat.* 137).

Subsequently Congress passed another Act, bearing upon this subject, which was approved May 27th, 1908, Sections 8 and 9, of which provide, among other things, as follows:

> Sec. 8. "That section twenty-three of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26th, 1906, is hereby amended by adding at the end of said section the words *'or a Judge of a County Court of the State of Oklahoma.*"

This section continues the requirements of Section 23 of the Act of April 26th, 1906, above, prescribing the formality with which a will of a full-blood Indian, disposing of lands, shall be executed.

> Same Act, Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the Court having jurisdiction of the settlement of the estate of said deceased allottee; etc., etc.*" (35 *Stat.* 312).

FINDINGS OF MASTER IN CHANCERY.

In substance as follows:

1. That the restrictions imposed by Section 19 of the Act of Congress, approved April 26, 1906, set out in full above, placing restrictions upon the alienation of the lands of full-blood Indians, are personal in their application, and do not apply to the inherited lands belonging to full-bloods.

2. That under the provisions of Section 22 of the above Act, the deeds executed by the plaintiff prior to August 8th, 1907, did not pass title to the lands in controversy, such deeds not having been approved by the Secretary of the Interior.

3. That all deeds made by plaintiff in error on and subsequent to August 8th, 1907, affecting the lands in controversy, are valid conveyances of the title to said lands, such conveyances having been made after the five years' period of restriction, provided in the supplemental Creek agreement, above, had expired and that said lands are not affected by any provision of the said Act of April 26, 1906.

4. That the relief prayed by plaintiff in error should be denied and his complaint dismissed for want of equity.

(*Transcript of record, page* 22).

FINDINGS OF TRIAL COURT.

The trial Judge presiding in the Western District of the Indian Territory refused to confirm the matters reported, and made findings of his own and rendered judgment thereon, such findings being in substance as follows:

1. That the plaintiff, Marchie Tiger, is a full-blood Indian citizen of the Creek Nation.

2. That he reached the age of 21 years prior to August 8, 1907.

3. That he is the sole heir of Sam, Martha, Lydia and Louisa Tiger.

4. That the four last named persons died intestate in the Western District of the Indian Territory, prior to April 26, 1906, seized and possessed of their respective shares of the lands of the Creek Nation allotted to them, and that they belonged to said tribe.

5. That on the 8th day of August, 1907, and the 13th day of August, 1907, Marchie Tiger, the sole heir of Lydia and Louisa Tiger, sold and conveyed to Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partmers, etc., as the Coweta Realty Company, the lands inherited from said persons (hereinbefore described).

6. That on the 8th day of August, 1907, Marchie Tiger, as the sole heir of Sam and Martha Tiger, conveyed to the Western Investment Company the lands allotted to said Sam and Martha Tiger which he had inherited from them (as hereinabove described).

7. That the Western Investment Company paid for same the sum of Two Thousand Dollars.

8. That the Coweta Realty Company paid for the lands purchased by it the sum of $855, and agreed to pay an additional sum of $1,115.

9. That the restrictions upon the alienation of the lands described had not been removed and that the deeds conveying same were not approved by the Secretary of the Interior.

10. That it is adjudged and decreed that the prayer of plaintiff for relief be allowed and that the defendants reconvey by quit claim to plaintiff all of said land within ten days, and upon failure thereof it is ordered that the conveyances be made by the Master in Chancery or Commissioner appointed by the Court.

11. That defendants pay the costs of the action.

(*Transcript of record, page* 24).

SUPREME COURT OF OKLAHOMA.

The conclusions reached by the Supreme Court of Oklahoma in its decision on the appeal of this case were in substance as follows:

1st. That Section 19 of the Act of Congress, approved April 26, 1906, (34 *Stat.* 137) did not attempt to impose any additional restrictions upon the alienation of inherited lands by full-blood Indians, and that the five year restriction against alienation imposed upon such lands by the supplemental Creek agreement, to-wit: The Act of Congress, approved June 30, 1902, (32 *Stat.* 500), were not modified nor extended by said Section 19.

2nd. That the purpose of the said Act, approved April 26, 1906, was to enable Indian heirs to alienate their inherited lands during the period between the taking effect of the said Act, to-wit: the date of its approval as aforesaid, and the expiration of the five year restriction of the said supplemental agreement, to-wit: August 8, 1907.

3rd. That the purpose of the last clause of the said Section 22, which reads as follows:

> "All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

was, to maintain the status fixed by the said supplemental Creek agreement, of disabilities imposed upon Indian heirs only who are full-bloods, restricting their lands, for the remainder of the unexpired portion of the five years' restriction provided in the

said supplemental agreement, to-wit: a period of approximately fifteen months, and that thereafter the restrictions upon the alienation of the inherited lands of full-blood Indians were removed or terminated by operation of Section 16 of the said supplemental agreement.

4th. That because of the words "inherited lands" do not appear in the said Section 19 of the Act of April 26, 1906, Congress had no purpose to extend the restriction upon the alienation of such land beyond the five year period fixed by the said supplemental agreement, and plaintiff in error can, therefore, claim no benefits thereunder whether the same be valid or invalid, and that a decision on the question of its validity was not necessary in determining the rights of plaintiff in error.

5th. That on the expiration of the five year period of restrictions imposed by the said supplemental agreement, to-wit, August 8, 1907, all restrictions upon the right of alienation of allotted lands inherited by full-blood Indian heirs from full-blood Indians, expired, and that all such lands upon that date became subject to alienation, without approval by the Secretary of the Interior.

6th. That the deeds executed as aforesaid by plaintiff in error to the lands in controversy on the said 8th day of August, 1907, and subsequent thereto, the same being executed subsequent to the expiration of the said five year period, are valid instruments of conyevance and conveyed to the grantees named therein a good title to such lands, and that the conclusions and judgment of the trial Court to the contrary were, therefore, erroneous. The decree of the lower Court was reversed and the complaint dismissed. (*Transcript of record, pages* 37, 38, 39).

THE ISSUE.

As shown above, Section 16 of the Act of Congress of June 30, 1902, known as the Supplemental Creek Agreement, imposed restrictions upon the alienation of all allotted lands for a period of five years.

These restrictions, in the absence of extension would all have expired on the 8th day of August, 1907.

Section 19 of the Act of Congress of April 26, 1906, provided that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of 25 years from and after the passage and approval of this Act, etc. And also provided that such full-blood Indians may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior.

The term "inherited lands" does not occur in this Section.

Section 22 of the same Act provided for the alienation of inherited lands generally, but the last sentence of said clause provided that conveyances made by heirs who are "full-blood Indians," should be subject to the *approval* of the *Secretary* of the *Interior,* etc.

Section 23 of the same Act authorized Indians of lawful age and sound mind to devise their estates by last will and testament but provided that full-blood Indians should not devise any lands except to the parent, wife, spouse, or children of such Indian, unless the will should be *acknowledged before or approved by the Judge of the United States Court* for the Indian Territory, or a *United States Commissioner.*

Section 8 of the Act of May 27th, 1908, amended Section 23 of the Act of April 26th, 1906, as to the execution of wills on inherited lands and Section 9 of the same Act provided that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, but provided that no *conveyance of any interest of any full-blood Indian heir in such land* should be valid, unless *approved by the Court* having jurisdiction of the settlement of the estate of the decedent.

To be determined:

1. Did the Act of Congress of April 26, 1906, by any or all of its provisions extend or was it designed to extend the restrictions upon the "inherited lands" of full-blood Indians?

2. If the extension of the period of restrictions upon "inherited lands" was intended by that Act or any of its provisions, is such Act constitutional? In other words, was it within the power of Congress, while all of those lands were yet under restrictions, to extend the restrictions beyond the time fixed in the said supplemental agreement?

ASSIGNMENT OF ERROR.

1. The Supreme Court of Oklahoma erred in deciding, that Section 19 of the Act of Congress, approved April 26, 1906, (34 *Stat.* 137), has no application to the inherited allotments of full-blood Indians; and that such lands are not included within the purpose of the enactment and that restrictions upon the alienation thereof were not intended thereby to be extended beyond the period of restrictions provided in the supplemental Agreement.

2. The last sentence of Section 22 of the said Act of Congress reads as follows:

"All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

The said Supreme Court erred in deciding that said provision was not operative on and after August 8, 1907, the date on which the restrictions imposed by Section 16 of the Act of Congress, approved June 30, 1902, commonly known as the Supplemental Creek Agreement, because on said date the restrictions on the inherited lands of full-blood Indians expired by operation of said Section 16 of the said Act, and that the said provision was not intended to extend the period of such restrictions.

3. The said Supreme Court erred in deciding that it was not the purpose or effect of the said Act of April 26, 1906, or any of the provisions thereof, to extend the restrictions upon the alienation of "inherited lands" of full-blood Indians beyond the period of restrictions provided by the said Supplemental Creek Agreement and that plaintiff in error was not entitled to any benefit and protection on the lands inherited by him from full-blood

allottees of the Creek Tribe of Indians by reason of said Act or any of its provisions.

4. The said Supreme Court erred in holding and deciding that the conveyances made by plaintiff in error on the 8th day of August, 1907, and subsequent thereto, were valid and that the grantees in same, defendants in error herein, by reason thereof acquired a good title to all of said lands and in holding and deciding that the decision of the lower Court to the contrary was error and in reversing the decision of the said lower Court and dismissing the complaint of plaintiff in error.

5. That plaintiff in error, a full-blood Indian, who inherited the lands in controversy from full-blood allottees of said tribe is entitled to the benefits and restrictions imposed upon the alienation of said lands by the said Act of Congress of April 26, 1906, and the various provisions thereof and that by the decision of the said Supreme Court of Oklahoma plaintiff in error has been erroneously denied, and deprived of, all right, protection and benefits thereunder, all of which he sought to establish in the proceedings before the said Court; and the said Supreme Court erred in deciding that the said Act and its various provisions were not applicable to "inherited lands" of full-blood Indians, and erred in refusing to further decide that the said Act and all its provisions are valid, and that plaintiff in error is entitled to the rights, benefits and protection which he sought to establish thereunder in the said action, thereby denying the plaintiff in error the benefits thereof.

PROPOSITIONS AND AUTHORITIES.

I.

In determining the meaning and application of a statute, the Courts will consider the mischief to be prohibited or the benefits to be conferred, the nature of the subject matter, the class and condition of the persons to be effected, the necessities and circumstances of its enactment, the system of laws of which it is a part, its necessary relation to an effect upon that system, its consistency with other provisions of the same and also prior and subsequent Acts, the general policy of legislation upon the same subject and the consequences to result from the construction adopted.

When the purpose and scope of a statute are thus ascertained its language becomes subservient thereto to the extent, that what is within the intention of the law-maker is within the statute whether within its terms or not, and that what is not within such intention is not within the statute although included within its terms.

Where a statute is clearly beneficent in its purposes and designed to benefit or protect a numerous class of persons, the presumption is, that it is intended to apply to all persons who, as proper subjects of such beneficence, naturally fall within the class so provided for; and in order that the purpose of the statute may be accomplished it will be liberally construed, and none who come within its legitimate range, as so determined, will be excluded from its operation.

From the inception of the legislation providing for allotment of these lands to the last Act upon the subject,

no affirmative expression by Congress can be found removing restrictions or governmental control from "inherited lands" of full-blood Indians; that wherever and whenever that class of lands are mentioned by Congress in any Act, beginning with the original Creek agreement of March 1, 1901, and ending with the Act of May 27, 1908, they are mentioned in provisions of statute directly prohibiting their free alienation; and if restrictions upon these lands, so many times thus imposed by Congress, and therefore deemed necessary, found in provisions both preceding and following said Section 19 of the Act of 1906, have been removed, it is by reason solely of the mere omission of the particular words, "inherited lands," from the said Section 19, and not because of any expressed, or necessarily implied, intention on the part of Congress to remove the same; and in the light of subsequent legislation, if so removed or abandoned, Congress was not aware that it had been done.

The authority of the government, so often asserted and so long exercised, over a subject so peculiarly within the province and necessity of that authority, will not be abandoned by such an omission when, upon all positive declaration, the intention has been otherwise.

Within the practical application of these principles, Sections 19 and 22 of the Act of Congress of April 26, 1906, when read in connection with Section 23 of the same Act and Sections 8 and 9 of the Act of May 27, 1908, will show a clear and unmistakable intention on the part of Congress to protect and, in furtherance of that end, to extend the period of restrictions upon the "inherited lands" of full-blood Indians for a period of twenty-five years.

Section 7 of the Act of Congress approved March 1, 1901, (31 Stat. 861).

Sections 6 and 16 of the Act of Congress approved June 30, 1902, (32 Stat. 500).

Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906, (34 Stat. 137).

Sections 8 and 9 of the Act of Congress approved May 27, 1908, (35 Stat. 312).

Enlich on the Interpretation of Statutes, Sections 43, 45, 103, 258, 265, 295, 320 and 322.

Southerland on Statutory Construction (2nd Ed. by Lewis) Sections 443, 447, 448, 585, 586, 590 and 592.

Black on Interpretation of Laws, Section 113.

Alexander vs. Mayor, etc., 5 Crauch l. c. 7-8 (Marshall)

United States vs. Freeman, 3 How., 556.

Brewer vs. Blougher, 14 Peters, 178.

Brown vs. Douchesne, 19 How., 183.

Lamp Chimney Company vs. Brass & Copper Co., 91 U. S., 656.

Kohlsaat vs. Murphy, 96 U. S., 153.

McKee vs. United States, 164 U. S., 287.

Interstate Drainage & Invest. Co. vs. Comes, 158 Fed., 273.

Goodrum vs. Buffalo, 162 Fed., (C. C. A.), 817.

Keeney vs. McVoy, 206 Missouri, 42.

Hill vs. American Surety Company, 200 U. S., 1. c., 203.

Johnson vs. Southern Pacific Company, 196 U. S., 1.

United States vs. Moore, 161 Fed., 1. c., 518-519.

United States vs. Hanson, 167 Fed., l. c., 893.

26 Op. Atty. Gen, 352.

II.

The power of the general government to deal with, control and protect the property of the Indian, where not expressly abandoned, is no longer open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and, likewise, that of judicial sanction as evidenced in many decisions of this Court.

This power must, in the nature of things, continue until its further exercise is deemed unnecessary by those in whom it rests.

United States vs. Rickert, 188 *U. S.*, 439;
Cherokee Nation vs. Hitchcock, 187 *U. S.*, 249;
Lone Wolf vs. Hitchcock, 187 *U. S.*, 553;
Stephens vs. Cherokee Nation, 174 *U. S.*, 484;
United States vs. Kagama, 118 *U. S.*, 375;
Worcestor vs. Georgia, 6 *Peters*, 515.
Wallace vs. Adams, 204 *U. S.*, 420.

III.

When the agreements were entered into between the government and the Creek tribe of Indians providing for the allotment of their lands and laws were enacted to carry them into effect, the authority of the government over these lands, exercised prior thereto, was not wholly abandoned or intended by either party to the agreements so to be abandoned. But, on the contrary, by express terms of the agreements, both the original and supplemental, restrictions were imposed upon the alienation of the allotments for a given period. This constituted a reservation of authority in the government over the allotments and was for the protection of the Indian in the use and enjoyment of same and was so understood by both him and the government. And at that time, had it been deemed necessary, a much broader authority could have been reserved out of the plenary authority till then exercised, as had been done under other allotment Acts.

By reason of this reservation of authority, the jurisdiction or power of Congress was continued and maintained over the subject; and this power, limited though it may be, can be exercised whenever in the judgment of Congress its exercise is necessary to protect the subject, that is, the property of the Indian, and to maintain, likewise, the policy of the government.

The breaking up of tribal interests in the lands and their allotment in severalty ushered in a new policy in dealing with the Indian. Not a policy of total abandonment, or of indifference to his welfare, but one still maintaining a degree of care and supervision over his interests, in the new form of private ownership, for a sufficient length of time for him to acquire experience enough in

property affairs to be self-reliant and qualified to protect his interests against the designs of the unscrupulous. The new policy sought to localize and individualize the Indian.

Restrictions upon the alienation of his lands is a part or feature of that policy and essential to its execution, because without a fixed abiding place the policy becomes immediately impossible; and Congress, having retained authority over the subject by agreement and, acting within the life of the agreement and while the tribal government still exists, may conclude that a longer period of care and supervision is necessary to its policy and in the best interests of both the government and the Indian and, thereupon extend the period of restrictions by appropriate legislation. Such a course, we believe, comes within the rightful exercise of power inherent in, and reserved over, the subject and that the Act in controversy and all its provisions are, therefore, valid.

Nor is this relation of the government and the Indian effected by his citizenship, nor by any other rights which he may possess, nor by the police power of the state over him, nor by any rights which the state of Oklahoma has in his premises; but, on the contrary, it is entirely compatible with all these.

Wiggan vs. Conolly, 163 *U. S.*, 60;
In re Heff, 197 *U. S.*, 488;
Goodrum vs. Buffalo, 162 *Fed.*, 817;
United States vs. Rickert, 188 *U. S.*, 432;
United States vs. Hall, et al., 171 *Fed.*, *l. c.*, 218;
Rainbow vs. Young, 161. *Fed.*, 836;
National Bank of Commerce vs. Anderson, 147 *Fed.*, 87;
United States vs. Thurston County, 143 *Fed.*, 287;
Lone Wolf vs. Hitchcock, 187 *U. S.*, 553;
McKay vs. Kalyton, 204 *U. S.*, 458;
Lydia B. Conley, Appellant, vs. James R. Garfield, Secretary of the Interior, et al., Appellee, .. *Sup. Ct. Rep.*

IV.

Powers, rights and interests of sovereignty are never relinquished by lapse or implication. Once established and asserted, they are presumed to exist and to continue to exist until abandoned by express terms. This principle applies, alike, to prerogatives of the executive, powers of the Legislature and the jurisdiction of Courts. All Acts derogatory thereof are strictly construed and every doubt resolved in favor of their perpetuity.

United States vs. Herron, 20 *Wall.*, 251;
National Bank of Commerce vs. Anderson, 147 *Fed., l. c.* 90;
Hamilton vs. Reynolds, 88 *Ind.*, 193;
State vs. Polacheck, 101 *Wis.*, 430;
Pooler vs. United States, 127 *Fed.*, 519;
United States vs. Knight, 14 *Pet.*, 301;
Wheeling & B. Bridge Co. vs. Wheeling Bridge Co., 138 *U. S.*, 287;
United States vs. Shaw, 39 *Fed.*, 39;
Mosle and others vs. Bidwell, 130 *Fed.*, 335.

On the Definition and Construction of Provisions:

Black on Interpretations and Construction of Laws, Sec. 110.
Georgia Banking Co. vs. Smith, 128 *U. S.*, 174.
Chesapeake & Potomac Tel. Co. vs Manning, 186 *U. S.*, 239.
United States vs. Whitridge, 197 *U. S.*, 135.
United States vs. Scruggs, Vandervoost & B., 156 *Fed.*, 940.

A

As a means of determining the proper construction of the Acts of Congress upon which the issue turns in this case let us consider briefly the policy of the government which has lead to the change in the status of Indian lands and the relation of the Indian thereto as well as to the government, which has been brought about by the legislation of recent years. From the beginning of the government till the Acts of Congress providing for the allotment of their lands in severalty were put into operation, the government has maintained a supervisory authority and protectorate over the tribal lands of the Five Civilized Tribes. The authority of the government over these tribes and their affairs has been plenary and has been exercised at all times to the fullest extent deemed necessary for the protection of their property, and the personal well being of the Indian has been, likewise, an object of governmental concern and he has been subjected to this supreme authority to the extent required by his best interests.

The duty of the government to the Indians rested upon that peculiar relation between it as the supreme authority of the land and the Indian tribes exercising authority inferior thereto, as semi-independent though dependent sovereignties, all within the same geographical limits. This relation has been so many times defined by this Court and the duty and likewise the power of the government in the premises so often proclaimed from the first case in which the question was presented to the last utterance of the Court upon the subject that it has become familiar law and a review of the authorities would not be warranted.

For many years the tribal status of most of the Indians was preserved and all their property held in common and the earliest

exercise of the protecting care of the government was over the Indians as tribesmen and their property as tribal property. But when the various Acts of Congress providing for the allotment of the lands of the tribes in severalty and conferring citizenship upon the individual members thereof, all looking to the final dissolution of tribal government, were passed, a change in the policy of the government toward the Indian and his property and in the method of exercising a protecting care thereover was necessarily involved.

The effect of these laws when put into operation made it impossible for the government longer to exercise this protection over the Indian's tribal interest in his property, as in the past, by simply protecting the tribal estate, as that form and method of guarding his interest passed out necessarily with the partition of the lands and their allotment to individuals.

It cannot, however, be inferred from all this that the policy adopted in the allotment of the lands in severalty was based upon the theory that the duty of the government to the Indian had ceased or that the Indian had reached that stage of advancement in civilization under which further regard and protection had become unnecessary or that the government had abandoned all its authority over him. The allotment laws were not enacted upon that erroneous assumption as the provisions to the contrary in the various Acts will abundantly demonstrate. They did, however, indicate a marked change in the policy of the government and its methods of dealing with the Indian and his affairs.

It was believed by Congress that the partition of the tribal lands and the ownership of individual portions thereof by members of the tribe and the exercise so far as he was capable of the duties and privileges of citizenship, would have a tendency to more rapidly advance him in those responsibilities; that if he, by being separated from his tribe and located upon his own property, would be given the inducement and opportunity of becom-

ing self supporting, that such a policy would have a tendency to make him industrious and self reliant and thereby accelerate his advancement.

This change of method and new policy of dealing with the Indian are perfectly consistent both with the power and the duty of the government to exercise such continued and further protection over him and to exercise it to the full extent deemed necessary for his welfare, and this inhered in and was a necessary part of the plan. In no instance which we recall has the government in the allotment of lands to Indians failed to recognize this continued duty and to exercise it in some proper degree and form under the reserved authority maintained continuously over his property. The emancipation from governmental control was intended to be accomplished by degrees. The government has attempted to qualify the Indian for self reliance step by step and the right through which the government once exercised full control over him has been deemed abundantly sufficient to authorize the exercise over him of a partial control where a partial control only was thought best and sufficient. The lesser was thought to be included in the greater.

In some of the earlier allotment acts the title to the allotted land was vested in the United States as trustee for a period of years for the use of the Indian and he was given the possession and occupancy thereof and, holding the legal estate for him, the government protected his property throughout the period of the experiment and preserved it against his own improvidence and protected it likewise from the avarice of the numerous white brother, ever ready for a bargain on the unequal terms. The theory upon which this was done was, as a matter of course, that the Indian was incapable, because of inexperience in business affairs and unfamiliarity with values and ownership, etc., to protect himself against improvident waste or dissipation of his estate; and that the lack of some such safeguard would most assuredly deprive him of all the benefits contemplated by the new policy

and thereby defeat the entire purpose of the government; and that, instead of acquiring a character of responsibility and self reliance as contemplated, he would become a vagabond, outcast or a government charge.

The later allotment laws dispensed with the trusteeship formerly created and permitted the allottee to hold the legal title to his allotment, but provided for restrictions against alienation for some given period of years. No allotments have been made to Indians of the Five Tribes, if anywhere, without one or the other of these safeguards, and we think it can be safely asserted that there is nothing in any legislation upon this subject and in aid of the new policy of the government which indicates that Congress did not consider it necessary to protect the Indian in his use and enjoyment of his separate property in a measure and for a time as he had formerly been protected in the use and enjoyment of the tribal property.

A restriction upon the alienation of an allotment provided for in the allotment Act is a reserved authority of the government over that allotment for the period specified and is a continuation to the individual allotment of a portion of the same authority and right of authority previously exercised over the same subject matter in the form of a tribal estate. The government does not abandon all authority simply because it abandons some, nor does the right cease to protect the Indian because a changed situation brings about a different method of administering the protection. None, not even the Indian, could question the plenary authority once exercised by the government. Who can deny the right to retain, and the exercise of, a limited authority? What principle could operate to the effect that, when some of the authority, no longer deemed necessary, is relinquished, the right to further exercise a necessary authority is thereby extinguished?

The result of all this has been, as must be evident, not that the protection of the government has ceased but that the

form in which it manifests itself only has been changed, so that the protection the individual formerly received through the protection of his Tribe and its property is continued to him and his individual property, in a limited degree, and in a form adapted to the situation, through restrictions against the alienation of his lands. This is a change of form and degree rather than of substance—a change necessary and adaptable to his newly created situation, but a continuing and reserved authority and protection over him and his property, nevertheless, which can be maintained just so long as the government deems it necessary to his well being.

B.

What purpose did Congress have in enacting those provisions of the Act of April 26th, 1906, relative to full-blood Indians? At that time all the lands of the Creek tribe of Indians were still under restrictions, which would expire within a short time by virtue of Section 16 of the Supplemental Creek Agreement.

Why were these provisions made only with reference to full-bloods? It must have been upon the theory that the full-blood Indian would not be prepared to protect himself in the unequal competition with the white man at the time the restrictions, originally provided for under the said supplemental agreement, would expire. Congress evidently believed then that this class of the Indians demanded further care and protection on the part of the government; that being a full-blood Indian, carrying the disabilities and characteristics of those people, he was not competent to protect his interests and that an abandonment of all care and authority over his property by the government would be a great injury to him and the consequences likewise an injury to the government. The fact that the full-blood Indian was singled out as the beneficiary of this legislation is conclusive, if the question needs any argument to establish it, that this class of Indians was the most needful and most deserving of this protection. This being true we are led to inquire, why he needed this protection as to directly allotted lands and not to inherited allotments? If incompetent to preserve his holdings of the one, he is equally incompetent to preserve his holdings of the other; and while Congress might have intended to arbitrarily furnish a protection to a part of his lands and ignore another part, where both parts are equally proper subjects of their consideration, it will hardly be presumed, in the absence of an expressed declaration to that effect, that such a result was intended. The

presumption must be, therefore, to the contrary, because both classes of the full-blood Indian lands fall equally within the spirit and reason of the law, and within the evil which the law was designed to remedy. This presumption is strengthened very much by provisions of the law, that will be noticed later, under which inherited lands of this class of Indians could not be devised by will to strangers, or out of the line of legal descent, without approval of the will. It would be difficult indeed to assign a reason for prohibiting a free disposition of these lands by will, taking effect only on the death of the testator and, therefore, after his use and occupancy of same had ended, while permitting the free alienation thereof during his life time when he needed their use and occupancy to sustain him in his efforts to attain the habits and character of self reliance, these being the most important results hoped for in the entire scheme of allotment in severalty.

> "It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is, therefore, to be given to the enactment so long as it does not go beyond its real object and scope. When, for instance, the language in its usual meaning falls short of the whole object of the legislature, a more extended meaning may be attributed to it if fairly susceptible of it. The scope of the Act being ascertained, the words are to be construed as including every case clearly within that object if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases."
>
> *Endlick on the Interpretation of Statutes, Sec.* 103.

The plaintiff in error here has the burden of showing, as contained in proposition I, that under the various Acts of Congress, bearing upon the subject, the "inherited lands" of a full-blood Indian were not alienable upon the 8th day of August or subsequent thereof until the Act of May 27, 1908, without the approval of the Secretary of the Interior, and with that proposition in view, we now direct the attention of the Court specifically to certain Acts of Congress and some authorities which we think aid in the proper interpretation and construction of those Acts; and for convenient reference to particular language therein, preserve our italics.

The intention of Congress must be determined from what it has said on the subject under consideration; not from what it said in any one Section or in any one Act, but from all it has said viewed in the light of the circumstances and conditions of the subject dealt with:

> "Where enactments, separately made, are read in parimateria, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and to connect them in a symmetrical system. Such statutes are taken together and construed as one system and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."
>
> *Southerland on Statutory Construction, 2nd Ed. Section* 448.

The first Act of Congress, embodying an agreement with the government and Creek tribe of Indians, in which the subject matter of this litigation was effected, was the Act approved

March 1st, 1901, (31 *Stat.* 861). Section 7 of this Act provided that the lands allotted to citizens of the tribe should not be incumbered or alienated by the allottee or his heirs before the expiration of five years from the ratification and approval of this agreement without the approval of the Secretary of the Interior. This applied to all Indians of whatever degree of blood.

Section 16 of the Act, ratifying the supplemental agreement between the government and the Creek tribe, approved June 30, 1902, (32 *Stat.* 500) became a substitute for and superceded the above provision of the Act of March 1st, 1901.

Said Section 16 provided that lands allotted to the citizens of the tribe should not in any manner or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval thereof. This Act of Congress was an extension of the period of restrictions beyond the time at which they would have expired under the original agreement, and applied, like the original agreement, to all Indians without reference to degree of blood.

No further legislation was had upon this subject until the Act of Congress, approved April 26, 1906, (34 *Stat.* 137). This enactment took place about fifteen months before the restrictions upon the alienation of the allotment of the Indian would have expired under the said supplemental agreement, and was enacted by Congress, undoubtedly, upon the theory that the needs of a certain class of the Indians demanded protection by the government far beyond the time provided in the said supplemental Creek agreement and the agreement effecting other tribes. This Act of Congress dealt especially with the interests and the lands of the full-blood Indians, the most helpless and most deserving of the government's care.

It is upon the construction of the various provisions of this Act that the issue here turns.

Section 19 of the Act reads as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizen of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

There are two features of this section which differ from Section 7 of the original, and Section 16 of the supplemental, agreement, above referred to. One is, that no mention in the section is made in terms of "inherited lands" of full-bloods; also

that no authority is given by which the Secretary can remove restrictions. Provisions on these matters are found in the sections referred to of both the former Acts.

In this connection we also call attention to Sections 20, 22 and 23 of the same Act which read as follows:

Sec. 20. "That after the approval of this Act all *leases and rental contracts,* except leases and rental contracts for not exceeding one year for agricultural purposes for *lands* other than homesteads, *of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior* and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper Court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

Sec. 22. "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may *sell and convey the lands inherited from such decedent;* and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such Court made upon petition filed by guardian. *All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."*

Sec. 23. "Every person of lawful age and sound mind may by last will and testament devise and bequeath

all of his estate, real and personal, and all interest therein: Provided, *That no will of a full-blood Indian devising real estate shall be valid,* if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, *unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."*

In determining the intention of Congress we contend that the above three sections must all be read in connection with Section 19.

Section 22 provides for the alienation generally of "inherited lands" on the part of both adults and minors. The last sentence of the section as will be seen, provides expressly that conveyances by heirs who are "full-blood" Indians shall only be made upon the approval of the Secretary of the Interior under such rules as he may prescribe. The contention of defendants in error will be that the last sentence of Section 22 is a mere limitation upon the foregoing part of the section; that it has no force as an independent provision in regard to the sale of "inherited lands" by full-blood Indians, except for the brief period to elapse between the date of the approval of the Act and the expiration of the five year period provided by the said supplemental agreement; that the sentence is a mere proviso; that as such it can have no force beyond the qualification of the preceding part of the section. While the plaintiff in error will insist that the said sentence is not a proviso either in form or substance and that it is not, therefore, susceptible of the narrow and restricted meaning and application so contended for; and that even as a proviso, it does not have such limited meaning and signification.

The construction of that clause contended for by the defendants in error is refuted in large measure we think by the proviso of Section 23 of the same Act. It will not be contended, we presume, that the proviso found in Section 23 is a proviso

also to Section 22, but it will be conceded, we apprehend, that Section 23 is an independent provision concerning the execution and effect of wills and the devise of lands thereby. It will be observed that the proviso to Section 23 is a limitation put upon the power of a full-blood Indian to devise by last will any real estate to others than his heirs at law, except upon the approval of a Judge of the United States Court or a United States Commissioner. This proviso is a limitation upon the power of a full-blood Indian to devise real estate, including as a matter of course both allotted and inherited lands, to others than his heirs at law, except upon approval as aforesaid. Defendants in error, therefore, find themselves in the position of contending that it was the purpose of Congress by the provisions in this Act to permit a full-blood Indian, however, incompetent he might be to sell and dispose of inherited lands as he might determine without the benefits of any safeguards whatever, but that he is prohibited from devising and disposing of the same lands by last will and testament to others than his legal heirs except upon the approval of the Judge of the Court or a Commissioner. There is nothing whatever in Section 23 that would indicate that its provisions are merely temporary, and that it is intended that they are only to be effective for the time between the approval of the Act and the expiration of the five year period of limitations of the supplemental agreement. It is the first provision by Congress upon the subject of devising lands by will and was enacted at a time when the authority of Congress over the allotted and inherited lands of these Indians was paramount as we shall attempt to show later; and the fact that the provision makes no exception to or classification of, inherited lands but treats all lands owned by a full-blood Indian the same and prohibits the devise of any lands to others than lawful heirs without approval, throws much light upon the general purpose of Congress, and supports the conclusion that the purpose was, to protect all the lands of the full-blood Indian without any nicety of discrimination and classification between direct allotments and inherited allotments.

We also direct attention here to one provision of Section 20 of the same Act, reading as follows:

> "That after the approval of this Act *all leases and rental contracts*, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, *of full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes *shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval:" etc., etc.*

It will be observed that the word "lands" is used in that section and not "allotments" and that it would, therefore appear that the restriction as to long time leases applies to all lands of a full-blood allottee of the tribe derived by direct allotment or descent from the tribal estate, with the single exception mentioned in the Act, of homesteads. Could it be contended under the provisions of this section that such a lease as authorized only upon approval, could be made upon any lands owned by a full-blood. In other words, are the restrictions of this section limited to surplus allotment only and not to his lands by both allotment and inheritance. The general term, lands, as used indicates that both are included. Inherited lands are certainly not excepted.

Much light is thrown upon the meaning of these sections and upon the general plan of Congress by Sections 8 and 9 of the Act of May 27, 1908, (35 *Stat.* 312). Section 8 provides:

> "That Section 23 of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26, 1906, is hereby amended by adding at the end of said section the words *'or a Judge of a County Court of the state of Oklahoma."*

This latter Act was adopted after statehood, and after the United States Court for the Indian Territory, mentioned in the said Section 23 above, had expired, thereby making said Sec-

tion 23 conform to the new order of things so that the wills devising inherited lands might be approved by either a United States Commissioner or a Judge of a County Court of the state of Oklahoma, the new Court created upon the admission of the state. There is nothing in said Section 8 or anywhere in that Act that indicated that the said Section 23 did not have in 1908 the same force and effect that it had when adopted, and nothing in the section which indicates that restrictions on the "inherited lands" of a full-blood Indian had expired on August 8, 1907, as contended by defendants in error. But, on the contrary, every inference to be drawn from the provision is that Congress considered that the restrictions on these lands had been extended and were in force. No other conclusion can be drawn as to the legislative theory of the status of these lands under the then existing law.

Section 9 of the said Act of May 27, 1908, reads as follows:

> "That the *death of any allottee* of the Five Civilized Tribes shall operate to *remove all restrictions* upon the alienation of said allottee's land: Provided, That *no conveyance of any interest of any full-blood Indian heir in such land* shall be valid unless *approved by the Court* having jurisdiction of the settlement of the estate of said deceased allottee, etc., etc."

Is Congress by said section attempting to re-establish its authority over the "inherited lands" of full-blood Indians, which was entirely relinquished, as defendants in error contend, on August 8, 1907, when the five year restriction of the supplemental agreement expired?

There might be grave doubt about the right of Congress to re-establish an authority previously relinquished over the property of a citizen of the United States, but there is nothing in the language of the section or anywhere in the Act that indicates in the slightest degree that it had occurred to Congress that this

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authority had been relinquished. This provision of Section 9, is therefore, conclusive of the fact, we submit, that Congress believed that restrictions upon all the lands of full-blood Indians had been maintained from the time of allotment to the date of its enactment. It is conclusive that Congress assumed that "inherited lands" were included in the extension of restrictions by Section 19 of the Act of 1906, or ~~by~~ if these lands are not in purpose included in the provisions of Section 19 of the same Act, that the said provision of Section 22 is amply sufficient within itself to impose a restriction upon that class of lands to continue after the expiration of the period of restrictions fixed by the supplemental agreement, [redacted]

It can, therefore, very correctly be concluded that Congress has in this latter Act interpreted the legislative intent of the Act of 1906, and this interpretation and construction by Congress will doubtless now, as in the past, receive great consideration by the Court.

This Court has in several instances given expression to the principles that control in determining the effect of such legislation. In *Alexander vs. The Mayor, etc.*, 5 *Cranch, page* 1, this Court, by Mr. Chief Justice Marshal, uses the following language:

> "Without deciding this question as depending merely on the original law, it is to be observed that Acts in *pari materia* are to be construed together as forming one Act. If in a subsequent clause of the same Act provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent Act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subject should be incorporated into the foregoing Act, is a direction to Courts in expounding the provisions of the law." (*l. c., p.* 7-8).

Again this Court, by Mr. Justice Wayne, in *The United States vs. Freeman, 3rd How.*, 556, *Syllabi* 1 *and* 2, said:

> "Statutes in *pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.
>
> And if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." (*See also l. c.* 564-565.

Again, in *Koshgonong vs. Burton*, 104 *U. S.*, 668, this Court by Mr. Justice Harlan, quotes approvingly from the opinion by Mr. Justice Miller in *Stockdale vs. Insurance Company*, (20 *Wall.*, 331) as follows:

"Both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind the Courts in reference to all transactions occurring after the passage of the law, and may, in many cases, thus furnish the rule to govern the Courts in transactions that are past, provided no constitutional rights of the party concerned is violated." (*l. c.* 679).

Again in *Cope vs. Cope*, 137 *U. S., page* 682, this Court by Mr. Justice Brown, uses the following language:

"These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones;" citing *3rd How.*, and 20 *Wall.*, above.

The same principle was recognized by the Circuit Court of the Ninth Circuit in *McFadden vs. Mountain View Min. & Mill Co.*, 97 *Fed.*, 670, where it is said:

"Moreover, the legislative construction of its own Act is always potent. 'If it can be gathered,' said the Supreme Court in *U. S. vs. Freeman*, 3 *How.*, 556, 564, 'from a subsequent statute in *pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute;'" quoting from a decision of the Supreme Court of Pennsylvania, as follows:

"If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended."

Quoting also approvingly from *Southerland on Statutory Construction, paragraph* 283, as follows:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in *pari materia,* are treated prospectively, and construed together, as though they constituted one Act. This is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared; harmonized, if possible; and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the latest enactment." (*2nd Ed., Sec.* 443).

Also, quoting approvingly from another well known author, *Endlich on the Interpretation of Statutes,* the first sentence of *paragraph* 43, which section we give here in full, as follows:

"Where there are earlier Acts relating to the same subject, the survey must extend to them, for all are, for the purposes of construction, considered as forming one homogenous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs. Thus not only may the entire body of the law on the subject be given the effect of a harmonious whole, by restraining, enlarging or qualifying conflicting words in any particular portion of it, by reference to other portions, so as to effectuate the obvious intention of the law; but where there are irreconcilably conflicting clauses in the same statute, a comparison with other statutes upon the same subject may point out those clauses which are in harmony with such legislations as designed to prevail."

We also call attention to a late case in which a later statute is said to throw light on the meaning of an earlier statute on the same subject and was considered in determining the meaning of the earlier statute.

United States Fidelity Co. vs. Kenyon, 204 *U. S., l. c.* 359.

C.

It will be contended by defendants in error that the last sentence in Section 22 of the Act of April 26, 1906, is a proviso and that its effect is, therefore, only a restriction upon the grant of authority to alienate and the method thereof contained in the preceding part of the section in which it occurs. This sentence reads as follows:

> "All conveyances made under this provision by *heirs who are full-blood Indians* are to be subject to the *approval of the Secretary of the Interior*, under such rules and regulations as he may prescribe."

This provision is not in form a proviso and we contend that it does not fill the office of a proviso within the intention of Congress, and on the other hand, in case it should be given that effect, it is still not subject to the construction and narrow application contended for by the defendants in error. Even a proviso in a statute often has an effect which restricts or enlarges the scope of the entire Act. The application of such provisions is not always limited to the matters only in the section in which they appear. They sometimes have as much force even when attached or subjoined to a paragraph of a statute as they would if standing alone in an independent paragraph.

When the scope and purpose of this Act and the manifest intention of Congress are considered, we believe it will be concluded that this provision of Section 22 has the full effect that its words import in providing the method by which only inherited lands of full-blood Indians may be alienated; and if inherited lands are not in purpose included in the provisions of Section 19 of the same act, that the said provision of Section 22 is amply sufficient within itself to impose a restriction upon that class of lands to continue after the expiration of the period of restrictions fixed by the supplemental agreement, and that by vir-

tue of such provision in Section 22, such lands could be alienated only upon the approval of the Secretary on and after August 8, 1907, the day on which the restdictions imposed by the supplemental agreement expired. No other construction of this provision can be harmonized with the other provisions of the same Act, especially Section 23 thereof, and with the provisions of Sections 8 and 9 of the Act of 1908 heretofore referred to.

If this clause of Section 22 is an independent provision, as we maintain that it is, then it is effective for all the purposes of prescribing the only manner in which inherited lands can be alienated by a full-blood Indian on and after August 8, 1907, to the full extent that the provisions of that Act, seeking to extend restrictions upon this class of lands, are within the constitutional powers of Congress to enact; but as the question of the validity of this law will be discussed in another part of the brief we here, assuming that the law is valid, refer the Court to the line of authorities which we think are controlling as to the meaning of this particular clause of Section 22, even though the same be considered a proviso.

A noted author, *Black on the Interpretation of Laws*, gives the following rule for the interpretation of such statutes:

> "Although as just stated the appropriate function of a proviso in a statute is to restrain or modify the enacting clause, and it should be confined to what precedes it, yet when from the context and from the comparison of all the provisions relating to the same subject matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and an effect beyond the phrase immediately preceding; it will be construed as restraining and qualifying preceding sections relating to the subject matter of the proviso, or as tantamount to an enactment in a separate section without regard to its position and connection. Hence, the proviso may qualify the whole or any part of the Act, or it may stand as an independent proposition or rule, if such is clearly seen to be the meaning of the legislature as disclosed by an examination of the entire enactment." (*Section* 110).

In speaking of such provisions in statutes, this Court used the following language:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signifcation than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."
>
> *Georgia Banking Company vs. Smith*, 128 *U. S., l. c.*, 181.

Again in *Chesapeake and Potomac Telephone Company vs. Manning*, 186 *U. S.*, 242, this Court announces the same principle and quotes approvingly the above language of this Court.

The same principle is re-announced in *United States vs. Whitridge*, 197 *U. S., l. c.*, 143. In the latter case the Court again refers to the principle of *Georgia Banking Co. vs. Smith*, above, as being applicable to a provision of statute in the form of a proviso, and uses this language:

> "While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we cannot forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."

In the light of all this legislation upon the subject it seems almost idle for defendants in error to contend that the only purpose of the last sentence in Section 22 of the said Act of 1906 was to provide for the method of alienating this class of lands during the short interval between the expiration of restrictions under the supplemental agreement, to-wit: August 8, 1907, and the taking effect of the Act in question, a period of approximately fifteen months; and likewise idle to contend that the operation of Section 23 was intended to be limited to the same brief period. This becomes more apparent when the Act of 1908 is examined with a view of determining the purpose of Congress and the meaning attributed by Congress to the earlier Acts. Section 8 of the Act of 1908 provides for a specific amendment of Section 23 of the Act of 1906, changing the method of approving wills which devise the real estate of full-blood Indians to strangers to the law of inheritance in force, so that a Judge of a County Court in the state of Oklahoma under said Section 8 may perform the function vested in a Judge of the United States Court of the Indian Territory, the office of Judge of the United States territory having ceased to exist upon the coming of statehood, and the office of a Judge of a County Court of the state of Oklahoma having been established to succeed to the functions of the former when it passed out.

This amendment contained in Section 8 of the Act of 1908 was intended to continue the operation of the said Section 23 of the Act of 1906, but was passed long after Section 23 had ceased to be operative according to the contention of defendants.

Again, if restrictions upon "inherited lands" of full-blood Indians expired on August 8th, 1907, as defendants contend, what will they say was the purpose of Section 9 of the Act of 1908? Will they contend that Congress did not know that under its former Acts, restrictions had already expired, or will they

assert that Congress simply attempted to accomplish a purpose possibly beyond its power, that of reimposing restrictions which had already expired. Of course, we realize that the rights of plaintiff in error in this case do not rest upon the said Section 9, as the transfers sought to be invalidated in this proceeding were made prior to its enactment, but as recently said in *U. S. Fidelity Co. vs. Kenyon*, 204 *U. S.*, 349, and other cases cited in the same connection, this latter Act throws light on the meaning of the former Acts. Section 9 of the Act of 1908 provides that the death of an allottee of the tribe shall operate to remove all restrictions upon the alienation of said allottee's lands with the following proviso:

> "That no conveyances of any interest of any *full-blood Indian heir* in such land *shall be valid* unless approved by the Court having jurisdiction of the settlement of the estate of said deceased allottee, etc."

These two sections, 8 and 9, taken together, therefore, makes it necessary that a will executed by a full-blood Indian, devising his inherited lands to strangers, shall be executed with like approval of a deed conveying inherited lands, that is, before the same Judge.

Or will defendants contend that between the expiration of the five year restriction of the supplemental agreement, and the taking effect of the Act of 1908, this class of lands were alienable unconditionally, but that since the Act of 1908 they are only alienable as provided in the latter Act? This would mean that Congress purposely enacted legislation to the effect that free alienation should exist on these lands between the expiration of the restrictions of the supplemental agreement, August 8, 1907, and the taking effect of the Act of 1908, a period sufficiently long, under the conditions existing in the Indian Territory at the time, for the "speculator" to get contracts, conveyances, etc., upon all of this class of lands; and that after this is all accomplished, Congress then intended by Section 9 of the

Act of 1908 to impose restrictions to prevent an evil thus already accomplished. Such a theory would indeed approach absurdity. But such would seem to be the legislative plan if the position of defendants in error is correct.

D.

We now call attention to these statutes in the order of their enactment, with the view of pointing out a consistent purpose on the part of Congress to preserve a uniform and continuing control over the lands of full-blood Indians, derived from the tribal estate; and also submit some authorities which we believe announce the principles that must control in determining the construction that this legislation must receive as a whole if the entire purpose of Congress is to be given the effect most reasonably and certainly intended, in view of all the circumstances of its enactment.

As appears from the foregoing, both Section 7, of the original, and Section 16 of the supplemental, Creek agreement, imposed restrictions upon the alienation of the "inherited lands" of full-blood Indians.

Section 19, of the Act of April 26th, 1906, prohibited "full-blood Indians" from alienating the lands allotted to them for a period of twenty-five years.

Section 20, of the same Act, prohibits full-blood "allottees" from leasing their "lands" for more than one year without the approval of the Secretary of the Interior.

Section 22, of the same Act, removed restrictions from inherited lands of Indians generally with the exception, that the last sentence of the section by way of an addition to its provisions declared that all conveyances made under this provision by "heirs who are full-blood Indians" are to be subject to the approval of the Secretary of the Interior under rules, etc.

Section 23 of the same Act provided that every person (In-

dian) of sound mind, etc., might devise his lands and property by will, but, provided further, "That no will of a *full-blood Indian* devising *real estate* shall be valid if such will and testament disinherits the parent, wife, spouse or children of such full-blood Indian unless acknowledged before and approved by a Judge of a United States Court for the Indian Territory, or a United States Commissioner."

Section 8, of the Act of Congress approved May 27th, 1908, enacted after statehood, amends the above Section 23, by providing for the approval of the wills of "full-blood Indian heirs" by a Judge of a County Court of the state of Oklahoma.

Section 9 of the said Act of May 27, 1908, provides that the death of an allottee shall operate to remove restrictions upon the alienation of his lands, but provides, "That no conveyance of any interest of any *full-blood Indian heir in such land shall be valid unless approved* by the Court having jurisdiction of the settlement of the estate of said deceased allottee, etc."

A consideration of this legislation as a whole must lead inevitably to the conclusion that Congress did, in fact, intend to maintain restrictions upon the inherited lands of full-blood Indians; otherwise, it would be impossible to account for so many positive declarations upon the subject which either directly proclaim the fact or assume its existence. At the date of the passage of the Act of April 26th, 1906, the land in controversy had been continuously under governmental control since the Louisiana purchase of which it was a part. This control never ceased during its occupancy by the tribe, and never ceased when allotted to the members thereof from whom plaintiff in error inherited it; and was over it at their death and at the date of the passage of the latter Act by virtue of the said supplemental agreement. Section 22, of the Act, specifically provides the only method of its alienation without qualification as to the time such condition should continue. Section 23 specifically provides the only method by which it can be devised by last will. Setion 8 of the Act of 1908 amends the law as to the approval of wills, on

the theory, of course, that such lands are yet subject to the authority of the government. Section 9, of the latter Act, removes the restrictions from all inherited lands assuming, certainly, that they exist, but specifically provides that conveyances of such lands by full-blood Indians shall be made only on approval by the Court having jurisdiction of the estate of the decedent. Will such a continuous duration and assertion of sovereign authority be deemed abandoned by implication?

Now, what does or can all this mean, if not that Congress intended through the entire period covered by these enactments to reserve and maintain this limited authority of the government over these lands? No other conclusion is consistent with any coherent or rational purpose on the part of Congress, the branch of the government charged with the primary duty in the premises of making proper provision for their status.

No answer has as yet been made to the position here assumed, except that in one section only, (19), in the entire chain of Acts and provisions on the subject, the term "inherited lands" is omitted. While every other consideration involved and every legitimate aid in the determination of the legislative intent, points with unerring certainty to the fact that the real purpose of Congress was to include this class of lands in the limited restrictions provided and retained for the protection of the full-blood Indians. They are included within both the spirit and the reason of the law and are within the letter of all provisions, but the one. We, therefore, insist that, if the purpose of Congress to maintain restrictions upon inherited lands of full-blood Indians can be determined by what it has done in numerous efforts to accomplish it, then that purpose cannot be obscure when all this legislation is considered.

We have heretofore cited and quoted from some decisions of this Court showing the effect a later Act or provision may have in determining the meaning and legislative intent of a former Act or provision. But we shall now take the liberty of referring to the language of a few eminent authors on the interpretation and construction of laws and to additional decisions of this Court, which we think most clearly warrant the construction of this legislation contended for by plaintiff in error.

Southerland on Statutory Construction (2nd Ed.) lays down the following rules:

"The Courts construed remedial statutes most liberally to suppress the mischief and advance the remedy. This principle operates to exclude as well as to include cases in furtherance of the law makers' intention. That which is not in the purpose or meaning, nor within the mischief to be remedied is not included in the statute even though it be within the letter. The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the Legislature intended to suppress. In doing so they often go quite beyond the letter of the statute. What is within the intention is within the statute, though not within the letter; and what is within the letter, but not within the intention is not within the statute." (*Section* 585).

"The intention is not something evinced *de hors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had, and that intention, when satisfactorily ascertained, is the design to which the letter is subordinated, and it is ever to be borne in mind that the intention is to be collected from the words, the context, the subject matter, the effects and consequences, the spirit and reason of the law and other Acts *in pari materia.* (*Sec.* 586).

"A statute extends no further than it expresses the legislative will. When it is held to embrace a case which is within its spirit, though not within its letter, it is not meant that the Courts have authority to ex-

tend a statute to cases for which it does not by its words provide or beyond the sense of its language. * * * * The modern doctrine is, that to construe a statute liberally or according to its equity, is nothing more than to give effect to it according to the intention of the lawmaker as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the Act; so it may restrain the general words to exclude a case not within that purpose." (*Section* 589).

"In statutes the sense signified is the law: * * * * Where the intention of the Act is manifest, particular words may have an effect quite beyond their natural signification, in aid of that intent." (*Section* 590).

"When the scope and intention of an Act are ascertained by all the aids available, words whose ordinary acceptation is limited may be expanded to harmonize with the purpose of the Act. This interpretation is admissible of statutes generally, but has a more liberal application to remedial and some other statutes which are liberally construed. It is applied to every case within the object of the Act, if it can reasonably be brought within its language. (*Section* 592).

"It is to be observed that in the comparison of different statutes, passed at the same session or nearly at the same time, this circumstance has weight, for it is usually referred to as indicating the prevalence of the same legislative purpose as rendering it unlikely that any marked contrariety was intended. But whether the prior statutes is recent or of long standing, it must yield if there is a conflict. * * * * Statutes which are not inconsistent with one another, and which relate to the same subject matter, are in *pari materia*, and should be construed together, and effect should be given to them all, although they contain no reference to one another and were passed at different times. Acts in *pari materia* should be construed together, and so as to harmonize and give effect to their various provisions. This is especially the case when the Acts are passed at the same session. * * * * Statutes constituting a

system should be so construed as to make that system consistent in all of its part and uniform in its operation.

Where statutes are part of a general system, relating to the same class of subjects and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. A statute must be construed with reference to the whole system of which it forms a part." (*Section* 443).

Black on Interpretation of Laws, speaks on the rule as to liberal construction as follows:

"Liberal construction on the other hand expands the meaning of the statute to embrace cases which are clearly within the spirit or reason of the law or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used; it resolves all reasonable doubts in favor of the applicability of the statute to the particular case." (*Sec.* 113).

Again,

"The rule requiring the interpretation of a statute in the light of and with reference to other in *pari materia* has a peculiarly appropriate application to Acts upon such kindred subjects passed at the same session of the Legislature. Indeed, in construing a statute, the entire scope of the legislation in *pari materia* of that session should be drawn into consideration." (*Section* 45).

"Whenever the language admits of two constructions, it is obvious that the more reasonable of the two should be adopted as that which the Legislature intended. * * * * On the contrary the presumption always is, where the design of an Act is not plainly apparent, that the Legislature intended the most reasonable and beneficial interpretation to be placed upon it.

It is obvious that the administration of justice requires something more than the mere application to the letter of the law designed for some particular class of ordinary cases to all others, however, modified by accident or withdrawn by extraordinary circumstances from the spirit of its enactment." (*Section* 258).

"It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore them; to give them operation if the language will permit instead of treating them as meaningless. But beyond this the duty of the Court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute or to technical rules of construction. Hence, in the construction of statutes an interpretation is never to be adopted that would defeat the purpose of the enactment if any other reasonable construction can be found which its language will fairly bear." (*Section* 265).

"Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentences," etc., etc. (*Section* 295).

"When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general." (*Sectoin* 322).

"What is within the plain intention of the makers of a statute, not falling under the rule of strict construction, being as much within the statute as if it were within the letter." (*Section* 320).

The statutes under consideration are all in *pari materia* as they apply to the same general subject of legislation and each

enactment and provision constitutes a part of the same system of laws. The rule as to such statutes as fully stated in the foregoing shows that they should be construed liberally and all together with the view of accomplishing the common purpose.

The principles applied by this Court many times in determining the construction of statutes, if applicable here as we contend they are, must resolve the issues in this case in favor of plaintiff in error. The Court has in many instances been compelled to vary the letter of the law to conform to its spirit, and to take a view of the entire scope, not of a single Act or provision, but of all Acts and provisions upon a given subject of legislation, in order to gather its true meaning and to carry out the real intent and accomplish the whole purpose of the lawmaker.

We invite attention here to the following expressions of the Court:

> "In the exposition of the statutes, the established rule is that the intention of the law-maker is to be deducted from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject they are all to be taken together, and one part to be compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one in *pari materia,* to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."
>
> *Kohlsaat vs. Murphy,* 96 *U. S., l. c.,* 159.

"It is true that if the language used in that last clause be given its broadest and widest application it would include all owners of real estate which had been sold in any portion of the country under the provisions of the direct tax Act. But we think our perusal of the whole Act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole Act. Under such circumstances it is not only the right but it is the plain duty of the Court to limit by a proper construction the otherwise boundless application of the general language used in the statute. As well said by Mr. Chief Justice Taney: 'It is undoubtedly the duty of the Court to ascertain the meaning of the Legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import if the Court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it.' *Brewer vs. Blougher*, 14 *Pet.* 178 *at* 198; *Petri vs. Commercial National Bank of Chicago*, 142 *U. S.*, 644, 650."

McKee vs. United States, 164 *U. S., l. c.*, 293.

"I agree to that rule in its true and sober sense; and that is, statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the Court in restricting them to classes, or in giving them the narrowest interpretation where the mischief is to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the Court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes

in the fullest manner, the apparent policy and objects of the Legislature."

Johnson vs. Southern Pacific Co., 196 *U. S., l. c.* 18.

"Statutes are not to be so literally construed as to defeat the purpose of the Legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter." *United States vs. Freeman*, 3 *How.*, 556. 'The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid that intent.' *Chief Justice Marshall in Durousseau vs. United States*, 6 *Cranch*, 307."

Hill vs. American Surety Co., 200 *U. S., l. c.* 203.

We believe these principles are applicable in all respects to the matter under consideration, and establish beyond question, the position here contended for by plaintiff in error.

The Circuit Court of Appeals, Eight Circuit, has considered a question very analagous to the one under consideration here, in the case of *Goodrum, et al., vs. Buffalo,* 162 *Fed.,* 817. That case involved the right of an Indian heir to alienate inherited lands allotted to a Quapaw Indian under the Act of Congress of March 2, 1895, (28 *Stat.,* 907). Under this Act the legal title was conveyed to the Indian under a patent with the proviso that the allotment shall not be alienable for a period of twenty-five years from and after the date of the patents. Prior to the expiration of the twenty-five years an attempt was made in the manner set out fully in the statement of the case and opinion to have the inherited allotment of one Arthur Buffalo alienated and deeds were procured from him and likewise a judgment of the United States Court in the Indian Territory was procured upon stipulation designed to aid the transaction by means of a decree which would operate as an estoppel against any attack that might later be made upon its validity.

It is true that the provision of the allotment Act in the case before the Court of Appeals differed in some respects from the Act under consideration here, that is, to Section 19 of the Act of April 26, 1906, but the language used by Congress in fixing restrictions upon the alienation of the Quapaw lands is not different in effect under this decision from the language used in Section 16 of the supplemental Creek agreement, which reads:

> "Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken or sold, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of the supplemental agreement except with the approval of the Secretary," etc.

The Act imposing restrictions upon the Quapaw allotments did not mention heirs but simply said "allotments shall be in-

alienable," etc. Section 16 of the Creek agreement, as will be observed, says the lands allotted, etc., shall not be "alienated by the allottee or his heirs." The Court of Appeals in the Buffalo case held that the restrictions run with the land under the Quapaw Act and that an heir to one of the allotments could not make a valid conveyance to same before the twenty-five years expired.

Section 19 of the Act of April 26, 1906, commonly known as the "McCumber Amendment," like the said Act relative to the Quapaw allotments, likewise, does not mention heirs. The language of these two Acts still differs literally in another particular. The Quawpaw Act says the "allotment shall be inalienable." The McCumber Amendment says the full-blood Indian "shall not alienate the lands allotted to him."

If the real purpose of Congress is not to be lost sight of we believe that this is a distinction without a substantial difference. The purpose of Congress was manifestly, as stated in the Buffalo case, to preserve this land to the use and occupancy of the Indian during the period thought necessary by Congress for his preparation and qualification to deal with it on his own account, and to protect him against the consequences otherwise obvious; and that being the purpose of it all, the controversy as to whether the restriction is upon the Indian or upon the land is entirely fruitless. Whether in terms it is the one way or the other the object to be attained is exactly the same. We think under the language of either statute that the restriction is upon both in the sense, that if a particular person is prohibited from selling a particular tract of land, both are effected; and that if a particular tract of land owned by a particular person is subject to a restriction against alienation, both are likewise effected. The provisions are in purpose and effect substantial equivalents. The distinction attempted is altogether too fine drawn and the point too hypertechnical to be available in defeating the general and beneficent purpose of Congress in dealing with a subject of this character.

We believe that the conclusion reached by the Court of Appeals in the Buffalo case to the effect that an heir could not alienate inherited lands under the Quawpaw Act providing that "allotments shall be inalienable" is applicable to the said Section 19 of the Act of 1906 which says that the full-blood Indian shall not "alienate the land allotted to him" and that, therefore, inherited allotments of the class of Indians designated in said Section 19 are under the same restriction as direct allotments by virtue of the said Section. In the above case the Circuit Court reviews a number of decisions in harmony with the conclusion reached and we respectfully invite the attention of this Court to that decision and the authorities considered.

E.

In support of proposition III, contended for by plaintiff in error, we desire to direct the attention of the Court particularly to a few of the authorities cited in support thereof. It is quite possible that no case exactly in point and on all fours as to the two questions involved here can be found in the decisions of this, or the inferior Courts. Some decisions have been rendered, however, on facts sufficiently analogous to give them some value as precedents.

We direct attention first to the decision in *Wiggan vs. Conolly*, above, 163, *U. S.*, 60. In that case it appeared that a treaty had been negotiated between the government and the Ottawa Indians in the state of Kansas in 1862 providing for the allotment of their lands in severalty and also that upon the receipt of a patent to their lands and the dissolution of the tribal government, which should take place at the end of five years, they should all become citizens of the United States, etc., etc. Before the expiration of the said five years negotiations were begun between the government and the tribe for the extension of the time for the dissolution of the tribal government. The agreement was not concluded, however, until after the five years mentioned in the original treaty expired. This latter treaty, called the treaty of 1867, was not completed and proclaimed until October 14, 1868. It was contended in that case that there was no power in the government to make the treaty of 1867 so called, or to extend the time for the dissolution of the tribal government beyond the five years provided in the original agreement and that as these Indians were citizens of the United States, by virtue of the original agreement, and also of the state of Kansas, the subsequent negotiations were not effective. This argument was made in the interest of sustaining a sale of the lands of a minor which had been made through a proceed-

ings in a Probate Court in Kansas. Had there been no further Act on the part of the government and the Indians after the treaty in 1862, this sale would doubtless have been valid as the tribal government would have been dissolved; the Indians would all have held their lands by fee simple title and would all have been citizens of the United States. The treaty of 1867, however, added a provision not contained in that of 1862 in the respect that the lands of a minor should not be alienated during his minority and it was this provision of the latter treaty that it was sought in that case to have declared invalid.

In discussing that feature of the question this language is used in the opinion:

> "This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

It will be observed in this connection that the Act of April 26, 1906, here in controversy, was passed before the dissolution of the tribal government of the Creek tribe and while their tribal affairs were unsettled. The tribal government was extended by joint resolution on March 2, 1906, as heretofore set out, and the Act was passed also before the period of restrictions imposed by the supplemental Creek agreement had expired, and while the tribe and their individual lands were still under such dominion of the government as is necessarily involved in the fact of such restrictions. It is true that at the

time of the Act of 1906 the members of the Creek tribe were citizens of the United States which fact, however, we contend, could not affect the situation or the relative rights of the parties in property affairs. It is specifically ruled in the above case that the fact of the allottee holding title to his allotment did not affect the right of the United States to add with the consent of the tribe a new limitation upon the right of alienation. Nor do we think that the consent of the tribe was a necessary prerequisite to the right of Congress to make further provision in regard to the matter. Had Congress acted prior to the expiration of tribal government and prior to the relinquishment of all control over the Indian and his lands, the Indian would have been bound. The consent of the tribe was given to the provisions as to the extension of the tribal government and the imposing of further restrictions upon the lands of minors and this fact is mentioned in the opinion. It will also be borne in mind that these transactions all took place at a time when all dealings with the Indians were conducted by treaty and prior to the Act of Congress of March 3, 1871, 16 *Stat.*, 566, dispensing with the treaty and providing for the disposition of Indian matters by Acts of Congress. Under this Act Congress may govern the Indian, may pass laws to promote his welfare without his consent.

The relation of the government to the Indian and the duty of the government are such that, independent of his will, Congress has declared its power to make such disposition for his welfare as it deems best so long as the tribe exists and the government has any control over the property which is the subject of the legislation.

The legislation of April 26, 1906, was enacted upon this theory, as a matter of course, and did not provide for any agreement of the Creek tribe of Indians or any ratification after the Act. It was an Act passed for their benefit and protection and so understood by them and was in fact ratified and approved by the Creek tribe in the manner prescribed for all their legislative

Acts. This fact does not appear in the transcript of the record and was not presented in the trial of the case below but the evidence of their action is a public record in the office of the Commission to the Five Civilized Tribes, which is the authorized custodian of all their records and the agency of the Department of the Interior for such purposes. We, therefore, embody a copy of it here to be considered by the Court for any purpose that it may be competent to serve. This resolution of the Creek National Council, as required by law, was duly signed by the proper officers of that body, approved by the President of the United States, and is as follows:

"Resolved by the National Council of the Muskogee (Creek) Nation, in extra session assembled; that Section nineteen (19) of the Act of Congress of the United States approved April 26th, 1907, (Public No. 129), which reads as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress; and for all purposes of the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of

restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

is hereby ratified, confirmed and approved.

Be it further resolved that Section twenty-two (22) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129) which reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and conve they lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may joint in a sale of such lands by a guardian duly, appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper Court of the county in which said minor or minors may reside or in whic hsaid real estate is situated, upon an order of such Court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

is hereby adopted, ratified and confirmed.

Be it further resolved that Section twenty-three (23), of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129), which reads as follows:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."
is hereby adopted, ratified and confirmed.

August 2nd, 1907.

DAVID ANDERSON,
Pres. House of Kings, Pro Tem.

SAM. GRAYSON,
Clerk.

Concurred in August 2nd, 1907.

ALEX DAVIS,
Speaker House of Warriors.

MILDRED CHILDERS,
Clerk.

Approved August 3rd, 1907.

P. PORTER,
Principal Chief.

THE WHITE HOUSE,
Washington, September 17, 1907.

APPROVED:
T. ROOSEVELT.

I hereby certify that I am the officer having custody of the records pertaining to the Acts and Resolutions passed by the National Council of the Creek Nation and that the above and foregoing is a true and correct copy of a Resolution passed by said Council August 2, 1907, approved by the Principal Chief of the Greek Nation August 3, 1907, and by the President September 17, 1907, ratifying and confirming Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Okla., Feb. 28, 1910.

While this action on the part of the tribe was not provided for in the Act of Congress relative to the extension of restrictions, it, nevertheless, shows the feeling of the Indian toward the provisions which are intended to accomplish that result. The Indian believed the Act was a protection to his property and so intended by Congress and he responded in this spontaneous ratification.

We now call attention to the decision in the matter of *Heff*, 197 *U .S.*, 488. This decision will be referred to by the defendonts in error in support of their position that Congress was without power in this matter and that the Indian because of being a citizen of the United States holding legal title to his lands, that, therefore, all power of Congress over the subject had entirely ceased. We do not think this decision can be given any such effect, principally for the reason that those questions were not at issue in the case. In that case the question presented to the Court was the right of the government to exercise a police power over an Indian citizen of the United States and the state of Kansas holding title to allotted lands. A prosecution had been instituted by the government for selling liquor to an Indian in violation of a federal law, namely, the Act of January 30, 1897, (29 *Stat.*, 506), providing a penalty for selling intoxicating liquors to an Indian to whom an allotment of land had been made while the title to the same remained in the United States, etc. The contention of the petitioner was that he was not liable to prosecution under the federal statute, on the ground that the laws regulating the sale of liquor in a state come within the police regulations of such state and that Congress could not assume a police regulation within the state in regard to that matter. This was the only question presented for determination in the case. There are, however, in the course of the opinion some principles announced to which we call the attention of the Court which we think are in line with the contention of plaintiff in error in this case. After reference to the Act of March 3, 1871, prohibiting a further dealing with the tribes by treaty, it is said:

"From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Again

"Of late years a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the Courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and Courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

We think the above case most clearly recognizes the distinction between a personal guardianship over the Indian and a control over his property and recognizes that the former may be abandoned and the Indian become subject to the police regulations of the state in which he resides long before the time when he can deal as one *sui juris*, and also that this personal guardianship may be abandoned and the Indian subjected to the police regulations of the state where he resides while yet retaining his tribal relation and his interest in tribal property and while the government still retains full and complete supervisory control over his lands. Upon this subject the Court says:

"But it is said that the government provided that the Indian's title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property; but these are mere property rights, and do not affect the civil or political status of the allottees. In *United States vs. Rickert*, 188 *U. S.*, 432, we sustained the right of the government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted); and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state Court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

So it must be seen from the doctrine of this decision that a restraint upon the alienation of property does not affect those civil and political rights which are proclaimed as a hindrance and bar to the execution of the policy of the government to protect the Indian in the enjoyment of his property rights by restrictions or conditions upon alienation.

This doctrine considered in connection with the announcement in *United States vs. Rickert* referred to therein, must show conclusively a recognition of the divisible nature of the authority formerly maintained by the government over the Indian and his property and likewise must show that a maintenance of a complete guardianship over both the person and property is not requisite to the exercise of any authority. We understand from these decisions that the guardianship formerly maintained over the person of the Indian may be entirely abandoned and authority over his property retained. This is in harmony with the regulations in many of the states in such matters in regard to minors and incompetents and their property. It is sometimes necessary to have a guardian of the person and

property. Sometimes a curator of the property only is required while the person, though incompetent, is permitted to enjoy his civil and political liberties without restraint of any kind; and so if it be the policy of the government to relinquish its guardianship over his person there would seem to be no objection to such course. It is, therefore, not necessary to establish here the technical relation of guardian and ward as to the person between the full-blood Indian allottees and the government in order to maintain that the government still has authority over their property; and although by the treaties and Acts of Congress providing for the allotment of these lands and the citizenship of the allottee the government has surrendered the person of the Indian to the police jurisdiction of the state where he resides, it by no means follows that because thereof the government has relinquished its authority over his property and that Congress is without further power to provide as it deems best for the protection of the Indian in its use and enjoyment in accordance with its policies.

Under the allotment Act of February 8, 1887, 24 *Stat.*, 388. provision was made, among other things, for patent to issue in the name of the allottee and that upon living apart from the tribe and upon the allotment the Indian should become a citizen of the United States with all the rights, privileges and immunities of citizens and should be entitled to the protection of all the laws in the state where he resided. The Act provided that the patent for the allotment should be issued in the name of the allottee and be of the legal effect and declare that the United States would hold the lands in trust for his use for a period of twenty-five years. Under this law this Court has several times held that the United States retained its authority over the allotment and that this authority was in no sense affected by the citizenship of the Indian. This was specifically held in *United States vs. Rickert*, 188 *U. S.*, 432, and likewise in *Heff's* case, 197 *U. S.*, 488. Under the allotment Act applicable to the Creek tribe of Indians, heretofore referred to, the patent issued in the name of

the allottee just as under the Act of 1887 but instead of the Act providing for the United States holding the lands in trust for the use and benefit of the Indians, a restriction was imposed by the law prohibiting the alienation of the land. We maintain that the authority of the government was thus reserved by reason of the restriction against alienation to the same extent and with like effect as under the Act of 1887 in which the trust was specifically declared. If the authority of the government was not reserved by this provision then the provision would be ineffective most certainly to accomplish the intended benefit. The Circuit Court of Appeals in the Ninth Circuit has expressed this view of the matter; in *National Bank of Commerce vs. Anderson*, 147 *Fed.*, 87. The question presented in the above case was the effect of the Act of Congress of May 27, 1902, providing for the alienation of inherited lands of allottees under the said Act of 1887. In the course of the opinion the Court says:

> "It is admitted that Henry Taylor is a citizen of the United States, is an Indian of the Puyallup Tribe, lives under the government or under official control. The land which was sold was allotted to James Taylor under the general allotment Act of 1887. That Act declared that the land should *not be alienated* by the allottee within a period of twenty-five years from the date of the allotment. Under the terms of the Act the allottee was allowed the use and occupation of the land, and the only limitation upon his title was the *restriction against alienation within the specified period.*" (Italics ours).

It was held in this case also that this trust over the land of the allottee attached to the proceeds of the sale of the inherited lands and continued the proceeds under the authority and disposition of the government for the benefit of the party entitled to it.

We maintain that a restriction imposed upon the alienation of an Indian allotment is a trust or power reserved to the gov-

ernment to protect that property for the intended use and that such power is as effective for that purpose as though a specific declaration of trusteeship had been declared. The trust provided for in the Act of 1887 is said in the above cause to be in effect only a restriction against alienation. Why should a restriction be imposed at all if the government is to lose control and to lose its power to enforce the restriction? If the Indian is wholly abandoned and his interests placed wholly within his own keeping without any authority reserved to aid him, the restriction would then be a mere expression and without effect for any purpose, because if he is responsible and competent to enforce a restriction he can, likewise, protect his interests.

It will be clearly seen from the authorities, we think, that the authority of the national government over Indian matters is clearly divisable and that the government may entirely abandon its guardianship over the person of the Indian and retain a curatorship, so to speak, or a form of authority over his property. This principle has been clearly recognized in the Federal Court in a late decision by Quarles, District Judge, in the following language:

> "Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other the management of his estate. We have seen it has been settled that the government may at any time terminate this relation of guardianship. It follows, therefore, it may at its pleasure emancipate the Indian from personal control, and still retain the other function of managing and conserving his property. That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language employed in the Act of 1887 that no argument could make it plainer. The purpose of the government to protect the title of allotted lands has been declared with equal distinctness."

United States vs. Hall, et al., 171 *Fed., l. c.* 218.

The argument, therefore, so persistently advanced by de-

fendants in error to the effect that the authority of the government over allotted lands, under restrictions and held by Indians who are citizens, had entirely ceased because the personal guardianship of the Indian had been abandoned, is seen to be without the support of authority and in fact against all authority as well as without the support of reason. It was also said in *Rainbow vs. Yound* (*C. C. A.*) 161, *Fed., l. c.* 837, by Vandevanter, Circuit Judge, speaking with reference to Indians having full citizenship and living upon allotments in the state of Nebraska made under the Act of 1887:

> "They are regarded as being in some respects still in a state of dependancy and tutilage which entitles them to the care and protection of the government."

In *Goodrum vs. Buffalo*, 162 *Fed., l. c.* 822, in discussing the question of the effect of the citizenship of the Indian upon the authority of the government to conserve his lands the Court quotes approvingly the following language of Thayer, Judge of the same Circuit Court of Appeals, rendered as early as 1894, as follows:

> "We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interests in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real estate, and to withhold from the donee for a season the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been

> regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it."

The same doctrine has been announced by this Court several times in the cases cited and it would seem that the question is not open to further controversy.

Again, it will be contended by defendants in error that the Act of Congress of April 26, 1906, attempting to extend restrictions upon these lands is a violation of the rights of the Indian under the agreement with the government; and it will be pointed out that Section 16 of the supplemental agreement limited the period of restrictions to five years and that an extension beyond that period violates the rights of the allottees under the agreement, and is, therefore, an act of bad faith.

This argument is completely answered by a decision of this Court rendered January 31, 1910, and not yet reported, where the question of good faith in maintaining treaty rights was considered, in which it is said in substance that the good faith of the government in dealing with the Indian,

> "would not be broken by a change believed by Congress to be for the welfare of the Indians."

Lydia B. Conley, appellant, vs. James R. Garfield, Secretary of the Interior, et al. .....

While defendants in error confidently claim that Congress is without power to extend restrictions, they at the same time insist that it had power to remove restrictions as done in Section 22 of the Act of 1906 and subsequent Acts. If the power had wholly ceased, of course, it could do neither. Their inconsistency seems not to have occurred to them.

The authority of the national government over Indian lands within the state of Oklahoma in whatever form or degree it may be exercised is in no sense inconsistent with the rights of the state of Oklahoma as one of the states of the Union admitted upon equal footing with the other states; nor does this authority in any way interfere with any rights which the state of Oklahoma has in the premises under numerous decisions of this Court in other similar instances. This situation was fully contemplated when Oklahoma was admitted into the Union. Section 1, of the Act of June 16, 1906, 34 *Stat.*, 267, providing for the admission of Oklahoma, commonly called the Enabling Act, contains the following provision:

> "That nothing contained in said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or legislation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

Clause 3 of Section 3 of the same Act provides as follows:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same

shall be and remain subject to the jurisdiction, disposal, and control of the United States," etc.

Section 22 of the said Enabling Act provides as follows:

"That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

In pursuance of the last above provision of the said Enabling Act the Constitutional Convention which met and adopted a constitution for the state of Oklahoma in pursuance of the said Act, adopted the following provision as Section 497 of the said constitution:

Sec. 497. "Be it Ordained by the Constitutional Convention for the proposed state of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocably, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states;'" etc., etc.

The said Act of Congress, and constitution were both adopted subsequent to the passage of said Act of Congress of April 26th, 1906.

All this, in the light of adjudication on kindred questions, would seem to dispose of, without further argument, any claim that may be made, that the authority of the government herein asserted is in conflict with any right of the state of Oklahoma. Independent of these provisions, however, the right of the National government to exercise its authority within a state over any subject committed to its care by the Constitution is too fundamental and well settled to require comment.

The great importance of the questions involved here is, in the nature of things, self evident. The number of full-blood Indians, throughout the Five Civilized Tribes, that will be affected by the result of a decision of the questions, makes it of peculiar interest to all of those tribes. Their bearing upon the policy of the government also lends an additional interest.

We have attempted and believe succeeded in showing,

First—That it was the evident intention of Congress by the Act of April 26, 1906, to extend the period of restrictions upon the alienation of the "inherited lands of full-blood Indians" for a period of twenty-five years; and,

Second—That the Act of Congress having this purpose in view, is a valid exercise of the legislative power of the government over the subject dealt with.

If we are correct in this, the conclusion reached by the learned Supreme Court of Oklahoma is erroneous and has deprived plaintiff in error of the rights, benefits and protection intended to be guaranteed to him by the said Act of Congress, and should, therefore, be reversed.

Respectfully submitted,

W. L. STURDEVANT,
Solicitor for Plaintiff in Error.
M. L. MOTT,
National Attorney for Creek Nation.
W. A. BRIGHAM,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 60

MARCHIE TIGER,
Plaintiff in Error,

vs.

THE WESTERN INVESTMENT COMPANY and ELLIS H. HAMMETT, R. C. ALLEN, and J. C. PINSON, Co-partners under the name of Coweta Realty Company,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF OKLAHOMA.

(REVISED)

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACT.

Plaintiff in error, Marchie Tiger, is a full-blood Indian and a member of the Creek Tribe of Indians, and duly enrolled as such upon the official roll of membership of the said tribe. The Creek Tribe is one of those commonly known as the "Five Civilized Tribes," which for many years occupied their respective reservations in the Indian Territory which now forms a part of the present State of Oklahoma and which, prior to the admission of said

State into the Union, was commonly known as the "Indian Country."

By virtue of an Act of Congress of May, 1830, and a treaty entered into in pursuance thereof concluded on the 13th day of February, 1833, the Creek Tribe of Indians became the owners of a large tract of land in the then Indian Territory, which they received in exchange under the terms of said treaty for lands then owned by them in the State of Georgia; and their title to this tract was evidenced by a patent issued and delivered by the United States, conveying the same to them, bearing date August 11th, 1852. The granting and habendum clause of the patent is as follows:

"In consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, has given and granted, by these presents does give and grant unto the Muskogee (Creek) Tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

This tract, or country, was occupied by said Tribe, from the time they arrived upon and took possession of same in pursuance of the Act of Congress and treaty aforesaid, until the partition of said lands and their allotment in severalty to the members thereof in pursuance of agreements between the government of the United States and said Tribe, and Acts of Congress mentioned below.

The lands in controversy were allotted to full-blood members of the Creek Tribe of Indians under the provisions of an Act of Congress approved June 30th, 1902, known as the "Supplemental Creek Agreement." Under this agreement these inherited lands were not subject to alienation until five years after its ratification without the approval of the Secretary of the

Interior. This five years extended to August 8th, 1907. Prior to the expiration of this period, however, and on April 26, 1906, Congress passed another Act, which it is contended by plaintiff in error extended the restrictions upon these lands beyond the period of five years, and that under the latter Act these lands were not alienable, without the approval of the Secretary of the Interior, on and after August 8th, 1907, because of such extensions.

Plaintiff in error inherited the lands in controversy in the year 1903, and attempted to sell same and make conveyances thereof on August 8th, 1907, without the approval of the Secretary of the Interior in violation of the provisions of the Act of April 26th, 1906, and now attempts to avoid such sale in a proceeding in substance as follows:

SUIT TO CANCEL CONVEYANCES.

Marchie Tiger, plaintiff in error and plaintiff below, commenced an action in the United States Court for the Western District of Indian Territory, sitting at Muskogee, on the 11th day of September, 1907, to annull and cancel certain conveyances by deed which he had previously made to four tracts of land, inherited by him from deceased members of his family, alleging in substance that he himself and those from whom he inherited, were all duly enrolled full-blood Indians and members of the Creek Tribe of Indians; that the lands in controversy were allotted to his decedents under the Act of Congress approved June 30, 1902, providing for the allotment of the lands of the Creek Tribe of Indians to the enrolled members thereof; that on the death of the parties to whom said lands were allotted during the year 1903, the same decended to and vested in him as their sole

and surviving heir; also that on August 8th, 1907, he sold and made deeds on the lands so inherited.

Plaintiff further alleged that by reason of the provisions of the Act of April 26th, 1906, and more particularly Sections 19 and 22 of said Act, the land which he had inherited from his deceased relatives was subject to restrictions at the date of the deed made by him on the said land, to-wit, August 8th, 1907; and that he was without power to sell the same and make a valid conveyance thereof without the approval of the Secretary of the Interior; and that the conveyance which he sought to rescind and set aside, were made without approval of the Secretary of the Interior. The plaintiff alleged a tender to the defendant purchasers of the full amount received by him for said lands and the refusal of the said defendants to accept the same. The plaintiff prayed for a cancellation of the conveyances made and the restoration of the lands sold.

The defendants contended in their pleadings and defense that the sales of the lands sought to be cancelled were valid and asserted title thereto under their purchase. They denied the applicability of the statutes, relied on by plaintiff to extend restrictions on the class of lands in controversy; and also denied the validity of such statutes if their purpose was to extend restrictions. (Transcript, pp. 11 to 15).

The proceedings in the lower court resulted in a decree for the plaintiff, cancelling the conveyances made on the ground that they had not been approved by the Secretary of the Interior as provided by Section 22 of the Act of Congress approved April 26th, 1906.

An appeal from this decision was prosecuted, and a decision rendered by the Supreme Court of Oklahoma reversing the lower court, dismissing plaintiff's

bill and entering judgment for the defendants. (Transcript, pp. 31 and 39).

The case is here on writ of error to the Supreme Court of Oklahoma and plaintiff in error seeks to reverse the decision of that court upon the grounds set out in his assignment of error. (Transcript, pp. 2 and 3).

LEGISLATION.

We now call attention to the several Acts of Congress and agreements between the government and Creek Tribe of Indians, which are important to be considered in determining the issue presented. As pointed out, until the year 1902, the Creek Tribe occupied their lands in the Indian Territory, as a Tribe, the individual members of which having only a communal interest therein. Several years before the lands were allotted to individuals, however, steps were taken by the Government to bring about the breaking up of the tribal relation and habit and to allot the lands to the members of the tribe in severalty.

The first move on the part of the Government looking to this end is evidenced by the Indian Appropriation Bill of March 3rd, 1893, found in 27 Stat. 645. Sections 15 and 16 of this Act provide as follows:

"Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chicasaws and Seminoles; * * * and upon the allotment of the lands held by said tribes the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 provided that the President should

nominate three commissioners to negotiate with any of the Five Tribes for the purpose of the extinguishment of the tribal title to the lands held by any Tribe either by cession of the same or some part of same or the allotment thereof to the individual members of such Tribe or in some other method agreeable to the negotiating parties.

Several attempts were made on the part of the Government Commission to effect an agreement with the Indians without success, but finally on the 8th of March, 1900, an agreement was concluded between the respective representatives of the Government and the Creek Tribe, which was enacted into law by Act of Congress approved March 1, 1901, (31 Stat. 861). This Act was known as the Original Creek Agreement. Section 3 of this Agreement and Act fixes the Standard of value and acreage of an allotment, and is as follows:

"Sec. 3. All lands of said Tribe, except as herein provided, shall be allotted among the citizens of the Tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure of the equalization of values * * *."

Section 7 of the same Act is important to be considered, because the first restrictions upon the alienations of the lands allotted are fixed by it. It is so far as material as follows:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incum-

bered, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior." * * *

No allotments were made under the first Agreement and Act above set out, but in the year 1902 another Agreement between the Government and Creek Tribe, known as the Supplemental Creek Agreement, was entered into which was ratified by Act of Congress approved June 30th, 1902. In the subsequent Agreement, Sec. 7, of the first Agreement, as above set out, was superseded by Section 16 of the latter Agreement, which section so far as it relates to restrictions upon the alienation of allotted lands is as follows:

"Sec. 16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

Section 6 of the said Supplemental Agreement, approved June 30th, 1902, as aforesaid, contains a further provision as follows:

"The provisions of the Act of Congress approved March 1, 1901, (31 Stat. L., 861) in so far as they

provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of **Mansfield's Digest of the Statutes of Arkansas** now in force in Indian Territory; Provided, **That only citizens of the Creek Nation, male and female. and their Creek descendants shall inherit lands of the Creek Nation:** And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to **non-citizen heirs in the order named in said Chapter 49.**"

The provisions of **Chapter 49 of Mansfield's Digest of the Statutes of Arkansas** relative to the descent and distribution of real estate so far as applicable here provides that real estate shall descend as follows:

First. "To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

This latter Agreement as required by the terms thereof was duly ratified by the action of the Creek National Council; and approved by the President of the United States on August 8th, 1902. It thus appears that the five year limitation upon the alienation of land allotted, except as to homesteads, would expire on August 8th, 1907. However, subsequent legislation, which will be set out more fully presently, extended or attempted to extend the period of restric-

tions upon alienation as provided by the said Supplemental Creek Agreement.

The tribal government of the Creek Nation is still in existence and operative within the limitations prescribed by law, as evidenced by the joint resolution of Congress approved March 2, 1906, which reads as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." (34 Stat. 822.)

The Union Agency and Commission to the Five Civilized Tribes were, when the Act of April 26, 1906, was passed, maintained by the government, and the affairs of the tribes are still unsettled.

The contention of plaintiff in error is that the subsequent legislation upon this subject is valid and effective in extending restrictions, and was enacted in the proper exercise of a Governmental and Constitutional power.

The position of defendant is that the restrictions upon the lands in controversy expired on August 8, 1907, under the terms of the said Supplemental Agreement, and that the subsequent legislation upon the subject hereinafter referred to was not intended to extend restrictions upon the class of lands in controversy; but that, if intended for such a purpose, the same is unconstitutional and therefore ineffective for any such purpose.

This difference in the interpretation of the purpose and application of the legislation on the subject constitutes the issue to be determined here.

The subsequent legislation relied upon by plaintiff in error extending the restrictions upon the inherited lands of full-blood Indians of the Creek Tribe and the particular provisions thereof which are found in the Act of Congress, approved April 26, 1906 (34 Stat. 137), and, also, the Act of July 27, 1908, interpreting and reaffirming the same, which may be properly considered in this action, is as follows:

Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations; Provided, further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered

into before the removal of restrictions, be and the same is hereby declared void; Provided, further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

"Sec. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, for full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided, further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"Sec. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes die intestate, without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to his tribe and be disposed of as herein provided for surplus funds, but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner

to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed."

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court of the Indian Territory. And in a case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

"23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, both real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

We call special attention to Sec. 28 of this same Act, relative to the continuation of the Tribal Governments of the Indians. It is as follows:

"Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Creek, and Seminole Tribes or Nations are hereby continued in force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said Tribes or Nations shall not be in session for a longer period than thirty

days in any one year: Provided, That no Act, ordinance or resolution (except resolutions of adjournment) of the tribal council or legislature of said Tribes or Nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or effecting any property belonging to any of said Tribes or Nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

We also call attention to Sec. 29 of this Act, which, on its face, is a specific repeal of any provision of the said Supplemental Creek Agreement, or any prior Act or agreement in conflict with this Act.

The section is as follows:

"Sec. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are, hereby repealed. (34 Stat. 137.)

On May 27, 1908 (35 Stat. 312), an Act was passed by Congress to define the status of lands belonging to the members of the Five Civilized Tribes, in which it is contended that Congress recognized the meaning and application of the said Act of April 26, 1906, contended for by plaintiff in error to the effect that the inherited lands of full-blood Indians were under restrictions. Section 8 of the Act of 1908 amended Section 23 of the said Act of 1906 as to the execution of wills by full-blood Indians, and Section 9 of the Act of 1908 prohibits full-blood Indians from selling inherited lands without the approval of the court having jurisdiction of the estate of the deceased allottee. The two sections of the latter Act to which we desire to call particular attention in this connection are Sections 8 and 9, which read as follows;

Sec. 8. "That section 23 of an Act entitled 'An Act to provide for the final disposition of the affairs

of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26th, 1906, is hereby amended by adding, at the end of said section the words, '**or a Judge of a County Court of the State of Oklahoma.**"

Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: **Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee; etc., etc.**" (35 Stat. 312.)

We call attention to another section of the statute which it may be important to consider in connection with the power of the Government to deal with the Indians through Acts of Congress independent of agreement with the tribe, which is found in the Act of Congress of March 3rd, 1871, and is as follows:

"Sec. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall hereby be invalidated or impaired." (United States R. S., Sec. 2079.)

We think the foregoing is all the legislation having any direct bearing on the issue here.

CONCEDED FACTS.

Under and in pursuance of the provisions of the said agreements and Acts of Congress the allotment to plaintiff in error, and the allotments involved in this case, were made as follows:

1. The East half of the Southwest quarter and the Northwest quarter of the Southeast quarter of

Section Twenty-five (25), Township Eighteen (18), North, Range Sixteen (16) East in the Creek Nation, Indian Territory, by deed dated November 17th, 1903.

To Marchie Tiger, Plaintiff in Error.

2. The Southeast quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16) East, by deed, dated 6th day of May, 1903, to Martha Tiger, a full-blood Creek Indian and member of said tribe, and a sister of Marchie Tiger, plaintiff in error.

3. The Southwest quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16) East, by deed bearing date April 3, 1903, to Sam Tiger, a full-blood Indian and a member of the Creek Tribe, and a brother of the said Marchie Tiger, plaintiff in error.

4. The Northwest quarter of Section Twenty-one (21), Township Eighteen (18), North, Range Sixteen (16) East, by deed bearing date May 6th, 1903, to Lydia Tiger, a full-blood Indian and a member of the Creek Tribe, and also a sister of the said plaintiff in error.

5. The Southwest quarter of Section Fifteen (15), Township Eighteen (18), North, Range Sixteen (16) East, by deed bearing date April 3rd, 1903, to Louisa Tiger, a full-blood Indian and member of the Creek Tribe, and also a sister of the said plaintiff in error.

Each of said allotments was evidenced by deed, executed by the Principal Chief of the Creek Nation, and approved by the Secretary of the Interior as required by law, and delivered to and accepted by said allottees, respectively, each allotment containing 160 acres of tribal lands.

The four persons last named, to-wit: Sam, Mar-

tha, Lydia and Louisa Tiger, died during the year 1803, and plaintiff in error, Marchie Tiger, was the sole and only heir-at-law of each of said decedents, and according to the law of descent and distribution of real property, then in force in said territory, succeeded and acquired title to the lands allotted to the decedents as aforesaid. (Chapter 49, Mansfield's Digest of the Statutes of Arkansas.)

By stipulation of counsel in the lower court, it was agreed that the four tracts of land last above described only are in controversy in this action.

Plaintiff in error is a full-blood Indian and duly enrolled as a full-blood and citizen of the Creek Tribe.

On August 8th, 1907, plaintiff in error sold and conveyed by warranty deed to the defendant in error, Western Investment Company, the allotments and lands above described, inherited by him from Sam and Martha Tiger, for the sum of $2,000, which consideration was paid.

On July 1st, 1907, plaintiff in error, sold and conveyed by warranty deed to defendant in error, Coweta Realty Company, the allotments and lands of Lydia and Louisa Tiger as above described; that he likewise on each of the following dates: July 26th, 1907; August 8th, 1907, and August 13th, 1907, sold and conveyed by deed, same property to said defendant in error, Coweta Realty Company, the full consideration for all of such conveyances being $3,000, of which $558 has been paid.

At the time of the execution of each of the above conveyances, plaintiff in error was over twenty-one (21) years of age.

Each of the above mentioned conveyances was made and executed by plaintiff in error without the approval of the Secretary of the Interior.

Also plaintiff in error offered to return to defendant, Coweta Realty Company, the sum of $558, full amount received from it, and made a tender thereof which was refused; and offered to return to the Western Investment Company the sum of $2,000, the amount received from it, and made a tender thereof which was refused.

Said lands all lie in Wagoner County, Oklahoma, and are a part of the tract and country acquired by the Creek Tribe from the government of the United States as aforesaid. (Transcript, pp. 18 and 19.)

FINDINGS OF MASTER IN CHANCERY.

In substance as follows:

1. That the restrictions imposed by Section 19 of the Act of Congress, approved April 26, 1906, set out in full above, placing restrictions upon the alienation of the lands of full-blood Indians, are personal in their application, and do not apply to the inherited lands belonging to full-bloods.

2. That under the provisions of Section 22 of the above Act, the deeds executed by the plaintiff prior to August 8th, 1907, did not pass title to the lands in controversy, such deeds not having been approved by the Secretary of the Interior.

3. That all deeds made by plaintiff in error on and subsequent to August 8th, 1907, affecting the lands in controversy, are valid conveyances of the title to said lands, such conveyances having been made after the five year period of restriction, provided in the supplemental Creek agreement, above, had expired and that said lands are not affected by any provision of the said Act of April 26, 1906.

4. That the relief prayed by plaintiff in error should be denied and his complaint dismissed for want of equity. (Transcript, page 22.)

FINDINGS OF TRIAL COURT.

The trial Judge presiding in the Western District of the Indian Territory refused to confirm the master's report, and made findings of his own and rendered judgment thereon, such findings being in substance as follows:

1. That the plaintiff, Marchie Tiger, is a full-blood Indian citizen of the Creek Nation.

2. That he reached the age of 21 years prior to August 8, 1907.

3. That he is the sole heir of Sam, Martha, Lydia and Louisa Tiger.

4. That the four last named persons died intestate in the Western District of the Indian Territory, prior to April 26, 1906, seized and possessed of their respective shares of the lands of the Creek Nation allotted to them, and that they belonged to said tribe.

5. That on the 8th day of August, 1907, and the 13th day of August, 1907, Marchie Tiger sole heir of Lydia and Louisa Tiger, sold and conveyed to Ellis H. Hammett, R. C. Allen and J. C. Pinson, co-partners, etc., as the Coweta Realty Company, the lands inherited from said persons (hereinbefore described).

6. That on the 8th day of August, 1907, Marchie Tiger, as the sole heir of Sam and Martha Tiger, conveyed to the Western Investment Company the lands allotted to said Sam and Martha Tiger which he had inherited from them (hereinbefore described).

7. That the Western Investment Company paid for same the sum of $2,000.

8. That the Coweta Realty Company paid for the lands purchased by it the sum of $855, and agreed to pay an additional sum of $1,115.

9. That the restrictions upon the alienation of the lands described had not been removed and that the deeds conveying same were not approved by the Secretary of the Interior.

10. That it is adjudged and decreed that the prayer of plaintiff for relief be allowed and that the defendant reconvey by quit claim to plaintiff all of said lands within ten days, and upon failure thereof it is ordered that the conveyances be made by the Master in Chancery or Commissioner appointed by the Court.

11. That defendant pay the costs of the action. (Transcript, page 24.)

SUPREME COURT OF OKLAHOMA.

The conclusions reached by the Supreme Court of Oklahoma in its decision on the appeal of this case were in substance as follows:

1st. That Section 19 of the Act of Congress, approved April 26, 1906 (34 Stat. 137), did not attempt to impose any additional restrictions upon the alienation of inherited lands by full-blood Indians, and that the five year restriction against alienation imposed upon such lands by the Supplemental Creek Agreement, to-wit: The Act of Congress, approved June 30, 1902 (32 Stat. 500), were not modified nor extended by said Section 19.

2nd. That the purpose of said Act, approved April 26, 1906, was to enable Indian heirs to alienate their inherited lands during the period between the taking effect of said Act, to-wit, the date of its approval as aforesaid, and the expiration of the five year restriction of said Supplemental Agreement, to-wit, August 8, 1907.

3rd. That the purpose of the last clause of said Section 22, which reads as follows:

"All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

was, to maintain the status fixed by the said Supplemental Creek Agreement, of disabilities imposed upon Indian heirs only who are full bloods, restricting their lands, for the remainder of the unexpired portion of the five years' restriction provided in the said Supplemental Agreement, to-wit: a period of approximately fifteen months, and that thereafter the restrictions upon the alienation of the inherited lands of full-blood Indians were removed or terminated by operation of Section 16 of the said Supplemental Agreement.

4th. That because the words "inherited lands" do not appear in the said Section 19 of the Act of April 26, 1906, Congress had no purpose to extend the restriction upon the alienation of such land beyond the five-year period fixed by the said Supplemental Agreement, and plaintiff in error can, therefore, claim no benefits thereunder whether the same be valid or invalid, and that a decision on the question of its validity was not necessary in determining the rights of plaintiff in error.

5th. That, on the expiration of the five-year period of restrictions imposed by the said Supplemental Agreement, to-wit: August 8, 1907, all restrictions upon the right of alienation of allotted lands inherited by full-blood Indian heirs from full-blood Indians, expired, and that all such lands upon that date became subject to alienation, without approval by the Secretary of the Interior.

6th. That the deeds executed as aforesaid by plaintiff in error to the lands in controversy on the said eighth day of August, 1907, and subsequent

thereto, the same being executed subsequent to the expiration of the said five year period, are valid instruments of conveyance and conveyed to the grantees named therein a good title to such lands, and that the conclusions and judgment of the trial court to the contrary were, therefore, erroneous. The decree of the lower court was reversed and the complaint dismissed (Transcript, pages 37, 38, 39).

THE ISSUE.

As shown above, Section 16 of the Act of Congress of June 30, 1902, known as the Supplemental Creek Agreement, imposed restrictions upon the alienation of all allotted lands for a period of five years.

These restrictions, in the absence of extension, would all have expired on the 8th day of August, 1907.

Section 19 of the Act of Congress of April 26, 1906, provided that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner, any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, etc. And also provided that such full-blood Indians may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior.

Section 22 of the same Act provided for the alienation of inherited lands generally, but the last sentence of said clause provided that conveyances made by heirs who are "full-blood Indians" should be subject to the **approval** of the **Secretary** of the **Interior,** etc.

Section 23 of the same Act authorized Indians of lawful age and sound mind to devise their estates by

last will and testament, but provided that full-blood Indians should not devise any lands except to the parent, wife, spouse or children of such Indian unless the will should be **acknowledged before or approved by the Judge of the United States Court** for the Indian Territory, or a **United States Commissioner.**

Section 8 of the Act of May 27th, 1908, amended Section 23 of the Act of April 26th, 1906, as to the execution of wills on inherited lands and Section 9 of the same Act provided that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, but provided that no **conveyance of any interest of any full-blood Indian heir in such land** should be valid, unless **approved by the Court** having jurisdiction of the settlement of the estate of the decedent.

To be determined:

1. Did the Act of Congress of April 26, 1906, by any or all of its provisions extend, or was it designed to extend, the restrictions upon the "inherited lands" of full-blood Indians?

2. If the extension of the period of restrictions upon "inherited lands" was intended by that Act or any of its provisions, is such Act constitutional? In other words, was it within the power of Congress, while all of those lands were yet under restrictions, to extend the restrictions beyond the time fixed in the said Supplemental Agreement?

ASSIGNMENT OF ERROR.

1. The Supreme Court of Oklahoma erred in deciding, that Section 19 of the Act of Congress, approved April 26, 1906, (34 Stat. 137), has no application to the inherited allotments of the full-blood Indians; and that such lands are not included within the purpose of the enactment and that restrictions upon the alienation thereof were not intended thereby to be extended beyond the period of restrictions provided in the Supplemental Agreement.

2. The last sentence of Section 22 of the said Act of Congress reads as follows:

"All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

The said Supreme Court erred in deciding that said provision was not operative on and after August 8, 1907, the date on which the restrictions imposed by Section 16 of the Act of Congress, approved June 30, 1902, commonly known as the Supplemental Creek Agreement, expired because on said date the restrictions on the inherited lands of full-blood Indians expired by operation of said Section 16 of the said Act, and that the said provision was not intended to extend the period of such restrictions.

3. The said Supreme Court erred in deciding that it was not the purpose or effect of the said Act of April 26, 1906, or any of the provisions thereof, to extend the restrictions upon the alienation of "inherited lands", of full-blood Indians beyond the period of restrictions provided by the said Supplemental Creek

Agreement and that plaintiff in error was not entitled to any benefit and protection on the lands inherited by him from full-blood allottees of the Creek Tribe of Indians by reason of said Act or any of its provisions.

4. The said Supreme Court erred in holding and deciding that the conveyances made by plaintiff in error on the 8th day of August, 1907, and subsequent thereto, were valid and that the grantees in same, defendants in error herein, by reason thereof, acquired a good title to all of said lands and in holding and deciding that the decision of the lower Court to the contrary was error and in reversing the decision of the said lower Court and dismissing the complaint of plaintiff in error.

5. That plaintiff in error, a full-blood Indian, who inherited the lands in controversy from full-blood allottees of said tribe, is entitled to the benefits and restrictions imposed upon the alienation of said lands by the said Act of Congress of April 26, 1906, and the various provisions thereof and that by the decision of the said Supreme Court of Oklahoma, plaintiff in error has been erroneously denied, and deprived of, all right, protection and benefits thereunder, all of which he sought to establish in the proceedings before said Court; and the said Supreme Court erred in deciding that the said Act and its various provisions were not applicable to "inherited lands" of full-blood Indians, and erred in refusing to further decide that the said Act and all its provisions are valid, and that plaintiff in error is entitled to the rights, benefits and protection which he sought to establish thereunder in the said action, thereby denying the plaintiff in error the benefits thereof.

PROPOSITIONS AND AUTHORITIES.

I.

In determining the meaning and application of a statute, the courts will consider the mischief to be prohibited or the benefits to be conferred, the nature of the subject-matter, the class and condition of the persons to be affected, the necessities and circumstances of its enactment, the system of laws of which it is a part, its necessary relation to an effect upon that system, its consistency with other provisions of the same and also prior and subsequent Acts, the general policy of legislation upon the same subject and the consequences to result from the construction adopted.

When the purpose and scope of a statute are thus ascertained its language becomes subservient thereto to the extent, that what is within the intention of the law-maker is within the statute whether within its terms or not, and that what is not within such intention is not within the statute although included within its terms.

Where a statute is clearly beneficent in its purpose and designed to benefit or protect a numerous class of persons, the presumption is, that it is intended to apply to all persons who, as proper subjects of such beneficence, naturally fall within the class so provided for; and in order that the purpose of the statute may be accomplished it will be liberally construed, and none who come within its legitimate range, as so determined, will be excluded from its operation.

From the inception of the legislation providing for allotment of these lands to the last Act upon the

subject no affirmative expression by Congress can be found removing restrictions or governmental control from "inherited lands" of full-blood Indians; that wherever and whenever that class of lands are mentioned by Congress in any Act, beginning with the original Creek agreement of March 1, 1901, and ending with the Act of May 27, 1908, they are mentioned in provisions of statute directly prohibiting their free alienation; and if restrictions upon these lands, so many times thus imposed by Congress, and therefore deemed necessary, found in provisions both preceding and following said Section 19 of the Act of 1906, have been removed, it is by reason solely of the mere omission of the particular words "inherited lands." from the said Section 19, and not because of any expressed, or necessarily implied, intention on the part of Congress to remove the same; and in the light of Subsequent legislation, if so removed or abandoned, Congress was not aware that it had been done.

The authority of the government, so often asserted and so long exercised over a subject so peculiarly within the province and necessity of that authority, will not be abandoned by such an omission when, upon all positive declaration, the intention has been otherwise.

Within the practical application of these principles, Sections 19 and 22 of the Act of Congress of April 26, 1906, when read in connection with Section 23 of the same Act and Sections 8 and 9 of the Act of May 27, 1908, will show a clear and unmistakable intention on the part of Congress to protect and, in furtherance of that end, to extend the period of restrictions upon the "inherited lands" of full-blood Indians.

Section 7 of the Act of Congress approved March 1, 1901, (31 Stat. 861);

Section 6 and 16 of the Act of Congress approved June 30, 1902, (32 Stat. 500);
Sections 19, 22 and 23, 28 and 29 of the Act of Congress approved April 26, 1906, (34 Stat. 137);
Sections 8 and 9 of the Act of Congress approved May 27, 1908, (35 Stat. 312);
Enlich on the Interpretation of Statutes, Sections 43, 45, 103, 258, 265, 295, 320 and 322;
Southerland on Statutory Construction (2nd Ed. by Lewis) Sections 443, 447, 448, 585, 586, 590 and 592;
Black on Interpretation of Laws, Section 113.
Alexander v. Mayor, etc., 5 Crauch, l. c. 7-8 (Marshall);
United States v. Freeman, 3 How., 556;
Brewer v. Blougher, 14 Peters, 178;
Brown v. Douchesne, 19 How., 183;
Lamp Chimney Company v. Brass & Copper Co., 91 U. S., 656;
Kohlsaat v. Murphy, 96 U. S. 153;
McKee v. United States, 164 U. S., 287;
Interstate Drainage & Invest. Co. v. Comes, 158 Fed., 273;
Goodrum v. Buffalo, 162 Fed., (C. C. A.), 817;
Keeney v. McVoy, 206 Missouri, 42;
Hill v. American Surety Company, 200 U. S., l. c., 203;
Johnson v. Southern Pacific Company, 196 U. S., 1;
United States v. Moore, 161 Fed., l. c., 518-519;
United States v. Hanson, 167 Fed., l c., 893;
26 Op. Atty. Gen. 352.

On the definition and construction of provisos, see,
Black on Int. and Const. of Laws, Sec. 110;
Georgia Buk. Co. v. Smith, 128 U. S. 174;
Chesapeake, etc. v. Manning, 186 U. S. 239;
U. S. v. Whitridge, 197 U. S. 135;
U. S. v. Scruggs, etc., B. 156 Fed. 940.

II.

The power of the general government to deal with, control and protect the property of the Indian, where not expressly abandoned, is no longer open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and, likewise, that of judicial sanction as evidenced in many decisions of this court.

This power must, in the nature of things, continue until its further exercise is deemed unnecessary by those in whom it rests.

United States v. Rickert, 188 U. S., 439;
Cherokee Nation v. Hitchcock, 187 U. S. 249;
Lone Wolf v. Hitchcock, 187 U. S. 553;
Stephens v. Cherokee Nation, 174 U. S. 484;
United States v. Kagama, 118 U. S. 375;
Worcestor v. Georgia, 6 Peters, 515;
Wallace v. Adams, 204 U. S. 420.

III.

When the agreements were entered into between the government and the Creek Tribe of Indians providing for the allotment of their lands and laws were enacted to carry them into effect, the authority of the government over these lands, exercised prior thereto, was not wholly abandoned or intended by either party to the agreements so to be abandoned. But, on the

contrary, by express terms of the agreements, both the original and supplemental, restrictions were imposed upon the alienation of the allotments for a given period. This constituted a reservation of authority in the government over the allotments and was for the protection of the Indian in the use and enjoyment of same and was so understood by both him and the government. And at that time, had it been deemed necessary, a much broader authority could have been reserved out of the plenary authority till then exercised as had been done under other allotment Acts.

By reason of this reservation of authority, the jurisdiction or power of Congress was continued and maintained over the subject; and this power, limited though it may be, can be exercised whenever in the judgment of Congress its exercise is necessary to protect the subject, that is, the property of the Indian, and to maintain, likewise, the policy of the government. The restriction is an agency through which a governmental power may be exercised

The breaking up of tribal interests in the lands and their allotment in severalty ushered in a new policy in dealing with the Indian. Not a policy of total abandonment, or of indifference to his welfare, but one still maintaining a degree of care and supervision over his interests, in the new form of private ownership, for a sufficient length of time for him to acquire experience enough in property affairs to be self-reliant and qualified to protect his interests against the designs of the unscrupulous. The new policy sought to localize and individualize the Indian. And the government undertook to protect him in an individual property right as it had previously done in a Tribal property right.

Restrictions upon the alienation of his lands is a part or feature of that policy and essential to its execution, because without a fixed abiding place the policy becomes immediately impossible; and Congress, having retained authority over the subject by Agreement and, acting within the life of the Agreement and while the tribal government still exists, may conclude that a longer period of care and supervision is necessary to its policy and in the best interests of both the government and the Indian and, thereupon, extend the period of restrictions by appropriate legislation. Such a course, we believe, comes within the rightful exercise of power reserved over the subject and that the Act in controversy and all its provisions are, therefore, valid.

Nor is this relation of the government and the Indian affected by his citizenship, nor by any other rights which he may possess, nor by the police power of the State over him, nor by any rights which the State of Oklahoma has in the premises; but, on the contrary, it is entirely compatible with all these.

Smith v. Stevens, 10 Wall. 321;
Wiggan v. Conolly, 163 U. S. 60;
In re Heff, 197 U. S. 488;
Goodrum v. Buffalo, 162 Fed. 817;
United States v. Rickert, 188 U. S. 432;
United States v. Hall, et al., 171 Fed., l. c. 218;
Rainbow v. Young, 161 Fed. 836;
National Bank of Commerce v. Anderson, 147 Fed. 87;
United States v. Thurston County, 143 Fed. 287;
Lone Wolf v. Hitchcock, 187 U. S. 553;
McKay v. Kalyton, 204 U. S. 458;

Conley v. Ballinger, Secretary of the Interior, 216 U. S., 84;
United States v. Elmer Shock, Treasurer, Fed. Rep. , Cr. Ct. E. D. Oklahoma;
Secs. 1, 3 (Clause 3) and 22, Enabling Act; 34 Stat. 267;
Sec. 497, Constitution Oklahoma.

IV.

Powers, rights and interests of sovereignty are never relinquished by lapse or implication. Once established and asserted, they are presumed to exist and to continue to exist until abandoned by express terms. This principle applies, alike, to prerogatives of the executive, powers of the Legislature and the jurisdiction of Courts. All Acts derogatory thereof are strictly construed and every doubt resolved in favor of their perpetuity.

United States v. Herron, 20 Wall. 251;
National Bank of Commerce v. Anderson, 147 Fed., l. c. 90;
Hamilton v. Reynolds, 88 Ind. 193;
State v. Polacheck, 101 Wis. 430;
Pooler v. United States, 127 Fed. 519;
United States v. Knight, 14 Pet. 301;
Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287;
United States v. Shaw, 39 Fed. 39;
Mosle and others v. Bidwell, 130 Fed. 335.

CHANGE IN POLICY.

As a means of determining the proper construction of the Acts of Congress upon which the issue turns in this case let us consider briefly the policy of the government which has lead to the change in the status of Indian lands and the relation of the Indian thereto, and to the government, which has been brought about by the legislation of recent years. From the beginning and till the Acts of Congress providing for the allotment of their lands in severalty were put into operation, the government has maintained a supervisory authority and protectorate over the tribal lands of the Five Civilized Tribes. The authority of the government over these Tribes and their affairs has been plenary and has been exercised at all times to the fullest extent deemed necessary for the protection of their property, and the personal well being of the Indian has been, likewise, an object of governmental concern and he has been subjected to this supreme authority to the extent required by his best interests.

The duty of the government to the Indians rested upon that peculiar relation between it as the supreme authority of the land and the Indian Tribes exercising authority inferior thereto, as semi-independent, though dependent sovereignties, all within the same geographical limits. This relation has been so many times defined by this court and the duty and likewise the power of the government in the premises so often proclaimed from the first case in which the question was presented to the last utterance of the court upon the subject that it has become familiar law and a review of the authorities would not be warranted.

For many years the tribal status of most of the Indians was preserved and all their property held in common, and the earliest exercise of the protecting care of the government was over the Indians as tribesmen and their property as tribal property. But when the various Acts of Congress providing for the allotment of the lands of the Tribes in severalty and conferring citizenship upon the individual members thereof, all looking to the final dissolution of tribal government, were passed, a change in the policy of the government toward the Indian and his property and in the method of exercising a protecting care thereover was necessarily involved.

The effect of these laws when put into operation made it impossible for the government longer to exercise this protection over the Indian's tribal interest in his property, as in the past, by simply protecting the tribal estate, as that form and method of guarding his interest passed out necessarily with the partition of the lands and their allotment to individuals.

It cannot, however, be inferred from all this that the policy adopted in the allotment of the lands in severalty was based upon the theory that the duty of the government to the Indian had ceased or that the Indian had reached that stage of advancement in civilization under which further regard and protection had become unnecessary or that the government had abandoned all its authority over him. The allotment laws were not enacted upon that erroneous assumption as the provisions to the contrary in the various Acts will abundantly demonstrate. They did, however, indicate a marked change in the policy of the government and its methods of dealing with the Indian and his affairs.

It was believed by Congress that the partition of the tribal lands and the ownership of individual portions thereof by members of the Tribe, and the exercise so far as he was capable of the duties and privileges of citizenship, would have a tendency to more rapidly advance him in those responsibilities; that being separated from his Tribe and located upon his own property, would have a tendency to make him industrious and self-reliant, and thereby accelerate his advancement.

This change of method and new policy of dealing with the Indian are perfectly consistent both with the power and the duty of the government to exercise such continued and further protection over him and to exercise it to the full extent deemed necessary for his welfare, and this power and duty inhered in and was a necessary part of the plan. In no instance which we recall has the government in the allotment of lands to Indians failed to recognize this continued duty and to exercise it in some proper degree and form under the reserved authority maintained continuously over his property. The emancipation from governmental control was intended to be accomplished by degrees. The government has attempted to qualify the Indian for self-reliance step by step and the right through which the government once exercised full control over him has been deemed abundantly sufficient to authorize the exercise over him of a partial control where a partial control only was thought best and sufficient. The lesser was thought to be included in the greater.

In some of the earlier allotment acts the title to the allotted land was vested in the United States as trustee for a period of years for the use of the Indian and he was given the possession and occupancy thereof and, holding the legal estate for him, the government

protected his property throughout the period of the experiment and preserved it against his own improvidence and protected it likewise from the avarice of the numerous white man, ever ready for a bargain on the unequal terms. The theory upon which this was done was, as a matter of course, that the Indian was incapable, because of inexperience in business affairs and unfamiliarity with values and ownership, etc., to protect himself against improvident waste or dissipation of his estate; and that the lack of some such safeguard would most assuredly deprive him of all the benefits contemplated by the new policy and thereby defeat the entire purpose of the government; and that, instead of acquiring a character of responsibility and self-reliance as contemplated, he would become a vagabond, outcast or a government charge.

The later allotment laws dispensed with the trusteeship formerly created and permitted the allottee to hold the legal title to his allotment, but provided for restrictions against alienation for some given period of years. No allotments have been made to Indians of the Five Tribes, if anywhere, without one or the other of these safeguards, and we think it can be safely asserted that there is nothing in any legislation upon this subject which indicates that Congress did not consider it necessary to protect the Indian in his use and enjoyment of his separate property in a measure and for a time as he had formerly been protected in the use and enjoyment of the tribal property.

A restriction upon the alienation of an allotment provided for in the allotment Act is a reserved authority of the government over that allotment for the period specified and is a continuation to the individual allotment of a portion of the same authority

previously exercised over the same subject-matter in the form of a tribal estate. The government does not abandon all authority simply because it abandons some, nor does the right to protect the Indian cease because a changed situation makes necessary a different method of administering the protection. None, not even the Indian, could question the plenary authority once exercised by the government. Who can deny the right to retain, and the exercise of, a limited authority? What principle could operate to the effect that, when some of the authority, no longer deemed necessary, is relinquished, the right to further exercise a necessary authority is thereby extinguished? Has Congress ever said that the government shall no longer exercise any control and protection over the property which is the subject of this legislation? No such declaration can be found.

The result of all this has been, as must be evident, not that the protection of the government has ceased but that the form in which it manifests itself only has been changed, so that the protection the individual formerly received through the protection of his Tribe and its property is continued to him and his individual property, in a limited degree, and in a form adapted to the situation, through restrictions against the alienation of his lands. This is a change of form and degree rather than of substance—a change necessary and adaptable to his newly created situation, but a continuing and reserved authority and protection over him and his property, nevertheless, which can be maintained just so long as the government deems it necessary to his well being; and an authority so long exercised will not be abandoned by mere implication. Nor will an abandonment be presumed where the intention is manifestly to the contrary, as evidenced by a continued exercise of the authority.

PURPOSE OF CONGRESS.

What purpose did Congress have in enacting those provisions of the Act of April 26th, 1906, relative to full-blood Indians? At that time all the lands of the Creek Tribe of Indians were still under restrictions, which would expire within a short time by virtue of Section 16 of the Supplemental Creek Agreement.

Why were these provisions made only with reference to full-bloods? It must have been upon the theory that the full-blood Indian would not be prepared to protect himself in the unequal competition with the white man at the time the restrictions, originally provided for under the said Supplemental Agreement, would expire. Congress evidently believed then that this class of Indians demanded further care and protection on the part of the government; that being a full-blood Indian, carrying the disabilities and characteristics of those people, he was not competent to protect his interests and that an abandonment of all care and authority over his property by the government would be a great injury to him and the consequences likewise an injury to the government. The fact that the full-blood Indian was singled out as the beneficiary of this legislation is conclusive, if the question needs any argument to establish it, that this class of Indians was the most needful and most deserving of this protection. This being true, we are led to inquire, why he needed this protection as to directly allotted lands and not to inherited allotments? If incompetent to preserve his holdings of the one, he is equally incompetent to preserve his holdings of the other; and while Congress might have intended to arbitrarily furnish a protection to a part of his lands and ignore another part,

where both parts are equally proper subjects of their consideration, it will hardly be presumed, in the absence of an express declaration to that effect, that such a result was intended. The presumption must be, therefore, to the contrary, because both classes of the full-blood Indian lands fall equally within the spirit and reason of the law, and both are subject of the evil which the law was designed to remedy. This presumption is strengthened very much by provisions of the law, that will be noticed later, under which inherited lands of this class of Indians could not be devised by will to strangers, or out of the line of legal descent as specifically fixed, without approval of the will. It would be difficult indeed to assign a reason for prohibiting a free disposition of these lands by will, taking effect only on the death of the testator and, therefore, after his use and occupancy of same had ended, while permitting the free alienation thereof during his life time when he needed their use and occupancy to sustain him in his efforts to attain the habits and character of self-reliance, these being the most important results hoped for in the entire scheme of allotment in severalty.

"It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is, therefore, to be given to the enactment so long as it does not go beyond its real object and scope. When, for instance, the language in its usual meaning falls short of the whole object of the legislature, a more extended meaning may be attributed to it if fairly susceptible of it. The scope of the Act being ascertained, the words are to be construed as including every case clearly within that object if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases."

Endlick on the Interpretation of Statutes, Sec. 103.

The plaintiff in error here has the burden of showing, as contained in proposition I, that under the various Acts of Congress, bearing upon the subject, the "inherited lands" of a full-blood Indian were not alienable upon the 8th day of August, the date of the sale in question, without the approval of the Secretary of the Interior, and not alienable after the Act of May 27th, 1908, without the approval of a judge of the County court; and with that proposition in view, we now direct the attention of the court specifically to certain Acts of Congress and some authorities which we think aid in the proper interpretation and construction of those Acts; and for convenient reference to particular language therein, emphasize same.

The intention of Congress must be determined from what it has said on the subject under consideration; not from what it said in any one Section or in any one Act, but from all it has said viewed in the light of the circumstances and conditions of the subject dealt with:

"Where enactments, separately made, are read *in pari materia* they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and to connect them in a symmetrical system. Such statutes are taken together and construed as one system and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

Southerland on Statutory Construction, 2nd Ed. Section 448.

The first Act of Congress, embodying an Agreement with the government and Creek Tribe of Indians, in which the subject matter of this litigation was effected, was the Act approved March 1st, 1901, (31 Stat. 861). Section 7 of this Act provided that the lands allotted to citizens of the Tribe should not be incumbered or alienated by the allottee or his heirs before the expiration of five years from the ratification and approval of the agreement without the approval of the Secretary of the Interior. This applied to all Indians of whatever degree of blood.

Section 16 of the Act, ratifying the Supplemental Agreement between the government and the Creek Tribe, approved June 30, 1902, (32 Stat. 500) became a substitute for and superceded the above provision of the Act of March 1st, 1901.

Said Section 16 provided that lands allotted to the citizens of the Tribe should not in any manner or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval thereof. This Act of Congress was an extension of the period of restrictions beyond the time at which they would have expired under the original Agreement, and more completely exempted them from liability for debt and applied, like the original Agreement, to all Indians without reference to degree of blood.

No further legislation was had upon this subject until the passage of the Act of Congress, approved April 26, 1906, (34 Stat. 137). This enactment took place about fifteen months before the restrictions upon the alienation of the allotment of the Indian would have expired under the said Supplemental Agreement, and was enacted by Congress, undoubtedly, upon the theory that the needs of a certain class of the Indians

demanded protection by the government far beyond the time provided in the said Supplemental Creek Agreement and the Agreements affecting other tribes. This Act of Congress dealt especially with the interests and the lands of the full-blood Indians, the most helpless and most deserving of the government's care.

It is upon the construction of the various provisions of this Act that the issue here turns.

Section 19 of the Act reads as follows:

"That no full-blood Indian of the Choctaw Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizen of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove pro-

vided and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

In this connection we also call attention to Sections 20, 22 and 23 of the same Act which read as follows:

Sec. 20. "That after the approval of this Act all **leases and rental contracts,** except leases and rental contracts for not exceeding one year for agricultural purposes for **lands** other than homesteads, **of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior** and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper Court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

Sec. 22. "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may **sell and convey the lands inherited from such decedent;** and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. **All conveyances made under this provision by heirs who are full-blood**

Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Sec. 23. "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, **That no will of a full-blood Indian devising real estate shall be valid,** if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, **unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."**

In determining the intention of Congress we contend that the above three sections must all be read in connection with Section 19.

Section 22 provides for the alienation generally of "inherited lands" on the part of both adults and minors. The last sentence of the section, as will be seen, provides expressly that conveyances by heirs who are "full-blood" Indians shall only be made upon the approval of the Secretary of the Interior under such rules as he may prescribe. The contention of defendants in error will be that the last sentence of Section 22 is a mere limitation upon the foregoing part of the section; that it has no force as an independent provision in regard to the sale of "inherited lands" by full-blood Indians, except for the brief period to elapse between the date of the approval of the Act and the expiration of the five year period provided by the said Supplemental Agreement; that the sentence is a mere proviso; that as such it can have no force beyond the qualification of the preceding part of the section. While the plaintiff in error will insist that the said sentence is not a proviso either in form or substance and that it is not, therefore, susceptible of the narrow and restricted meaning and

application so contended for; and that even as a proviso, it does not have such limited meaning and significance. And will further contend that if, on and after August 8th, 1907, there is any conflict between the last sentence of Section 22 of the said Act of 1906 and Section 16 of the Supplemental Creek Agreement, that the latter is repealed by Section 29 of the said Act of 1906, which says: "That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby repealed."

The construction of that clause contended for by the defendants in error is refuted in large measure we think by the proviso of Section 23 of the same Act. It will not be contended, we presume, that the proviso found in Section 23 is a proviso also to Section 22, but it will be conceded, we apprehend, that Section 23 is an independent provision concerning the execution and effect of wills and the devise of lands thereby. It will be observed that the proviso to Section 23 is a limitation put upon the power of a full-blood Indian to devise by last will any real estate to others than his heirs at law, except upon the approval of a Judge of the United States Court or a United States Commissioner, applying to both allotted and inherited lands. Defendants in error, therefore, find themselves in the position of contending that it was the purpose of Congress by the provisions in this Act to permit a full-blood Indian, however, incompetent he might be, to sell and dispose of inherited lands as he might determine without the benefits of any safeguards whatever, but that he is prohibited from devising and disposing of the same lands by last will and testament to others than his legal heirs except upon the approval of a Judge of the Court or a Commissioner. There is nothing whatever in Section 23 that would indicate that its provisions are

merely temporary, and that it is intended that they are only to be effective for the time between the approval of the Act and the expiration of the five year period of limitations of the Supplemental Agreement. It is the first provision by Congress upon the subject of devising lands by will and was enacted at a time when the authority of Congress over the allotted and inherited lands of these Indians was paramount, as we shall attempt to show later; and the fact that the provision makes no exception to inherited lands but treats all lands owned by a full-blood Indian the same and prohibits the devise of any lands to others than lawful heirs without approval, throws much light upon the general purpose of Congress and supports the conclusion that the purpose was to protect all the lands of the full-blood Indian without any nicety of discrimination and classification between direct allotments and inherited allotments.

We call the attention of the court here to the very recent case of the United States of America v. Elmer Shock, County Treasurer, decided by Campbell, District Judge, Circuit Court, United States for the Eastern District of Oklahoma, — Fed — , not yet reported, in which he considers fully Sections 22 and 23 of the Act of April 26th, 1906, and portions ot a later Act. The question arose in an injunction suit brought against the County Treasurer of Okmulgee County to prevent the sale of certain lands (still under restrictions) for taxes levied against the same by the authorities of the county, in which the interpretation of these Sections of Statutes were involved. In discussing the two Sections in connection with Section 19 of the same Act, the court uses the following language:

"As to full-blood heirs, it is urged by the defendant that the provision requiring the conveyance of

their interest in such inherited lands are to be subject to the approval of the Secretary of the Interior, has no reference to Section 19, which in terms extends restrictions upon the alienation of the lands **allotted** to full-bloods for a period of twenty-five years; that it merely has reference to the restrictions provided in the Supplemental Agreement as to surplus and homestead, and provides that as to full-bloods these restrictions shall not be affected by the Act, but shall remain on the land until they expire by their limitations, as provided in the said Supplemental Agreement. It will be noted that the twenty-five years restriction imposed by Section 19 applies in terms to "any of the lands **allotted** to full-bloods. The term "allotment," in the Indian legislation now under consideration, pursuant to which the lands of the Five Civilized Tribes were divided among the individual members thereof, has a special signification, and applies to the integral part of the land of a particular tribe which each individual member of such tribe receives as his share in the division of such land contemplated by Congress in the Act of 1893, providing for the Dawes Commission, and carried out pursuant to that and subsequent legislation; but even though there be a distinction between the class of lands treated in Section 19 and those treated in Section 22, the one being the original allotment and the other the inherited lands, still it does not follow that Congress only intended to provide for the approval of the Secretary of the Interior until the expiration of the term for which restrictions were imposed by the Supplemental Agreement. Section 29 of the Act provides "that all Acts or parts of Acts inconsistent with the provisions of this Act be, and the same are, hereby repealed." The five year term, for which the restrictions as to surplus lands were originally imposed, would expire in August, 1907, a little more than a year after the passage of this Act. Congress is presumed to have legislated with this in mind, and it is not to my mind reasonable that had it only intended this provision to be effective for that short space of time, it would have used the general language with-

out qualification. Had such been the intention, it is my opinion that it would have been made clear by a qualification, that such approval would not be required after the expiration of the restrictions provided in the two agreements referred to. That it did not do so, convinces me that it was intended to extend this restriction upon the sale of these inherited lands in the hands of the full-blood heirs beyond the time provided in the Agreements. Now, if Congress intended, as defendant contends, that after August 8, 1907, a full-blood heir might sell his inherited lands without restriction, then it would be unreasonable to suppose that it would provide in the same Act that he can not dispose of the same character of lands by will without restriction. But in Section 23, the very next section, it was provided:

'Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner.'

That this approval of the court was necessary after August 8, 1907, is clear from the subsequent Act of May 27, 1908 (35 Stat. 312), wherein it is provided that Section 23, above referred to, shall be amended by adding the words 'or a judge of a county court of the State of Oklahoma.' This clearly shows that Congress considered the provision as to the approval of wills of full-bloods to be in effect. It applies to any will of a full-blood devising real estate, making no distinction between his personal allotment and lands inherited by him. This is inconsistent with the idea that all restrictions upon the sale of his inherited lands expire on August 8, 1907. It was held in United States v. Freedman, 3rd How. 556, that if it can be gathered from a subsequent statute *in pari materia* what meaning the legislators attached to the

words of a former statute, this will amount to a legislative definition of its meaning, and will govern the consideration of the first statute. The continuation of this provision regarding wills in the subsequent Act referred to, amounts to a legislative declaration that it was not the intention of Congress in the Act of April 26, 1906, that all restrictions upon the alienation of lands inherited by full-bloods should expire on August 8th, 1907. It was the intention of Congress that such restrictions should continue beyond that date, and until removed by subsequent legislation. It follows that the interest of all full-blood Creek heirs in the inherited lands owned by them on March 1, 1908, was not subject to taxation."

We also direct attention here to one provision of Section 20 of the same Act, reading as follows:

"That after the approval of this Act **all leases and rental contracts,** except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, **of full-blood allottees** of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes **shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval," etc., etc.**

It will be observed that the word "lands" is used in that Section and not "allotments" and that it would, therefore, appear that the restriction as to long time leases applies to all lands of a full-blood allottee of the tribe derived by direct allotment or descent from the tribal estate, with the single exception mentioned in the Act, of homesteads. Could it be contended under the provisions of this section that such a lease as authorized only upon approval, could be made upon any lands owned by a full-blood. In other words, are the restrictions of this section limited to surplus allotment only and not to his lands by both allotment and inheritance. The general

term, lands, as used indicates that both are included. Inherited lands are certainly not excepted.

Much light is thrown upon the meaning of these sections and upon the general plan of Congress by Sections 8 and 9 of the Act of May 27, 1908 (35 Stat. 312). Section 8 provides:

"That Section 23 of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26, 1906, is hereby amended by adding at the end of said section the words **'or a Judge of a County Court of the State of Oklahoma.'** "

This latter Act was adopted after statehood, and after the United States Court for the Indian Territory, mentioned in said Section 23 above, had expired, thereby making said Section 23 conform to the new order of things so that the wills devising inherited lands might be approved by either a United States Commissioner or a Judge of a County Court of the State of Oklahoma, the new court created upon the admission of the State. There is nothing in said Section 8 or anywhere in that Act that indicates that said Section 23 did not have in 1908 the same force and effect that it had when adopted, and nothing in the section which indicates that restrictions on the "inherited lands" of a full-blood Indian had expired on August 8, 1907, as contended by defendant in error. But, on the contrary, every inference to be be drawn from the provision is that Congress considered that the restrictions on these lands had been extended and were in force. No other conclusions can be drawn as to the legislative theory of the status of these lands under the then existing law, and this amounts to a legislative interpretation of Sections 22 and 23 of the Act of April 26th, 1906.

Section 9 of said Act of May 27, 1908, reads as follows:

"That the **death of any allottee** of any of the Five Civilized Tribes shall operate to **remove all restrictions** upon the alienation of said allottee's land: Provided, that **no conveyance of any interest of any full-blood Indian heir in such land** shall be valid unless **approved by the Court** having jurisdiction of the settlement of the estate of said deceased allottee, etc., etc."

Is Congress by said section attempting to re-establish its authority over the "inherited lands" of full-blood Indians, which was entirely relinquished, as defendant in error contends, on August 8, 1907, when the five year restriction of the Supplemental Agreement expired?

There might be some doubt about the right of Congress to re-establish an authority previously entirely relinquished, but there is nothing in the language of the section or anywhere in the Act that indicates in the slightest degree that it had occurred to Congress that this authority had been relinquished. This provision of Section 9, is therefore, conclusive of the fact, we submit, that Congress believed that restrictions upon all the lands of full-blood Indians had been maintained from the time of allotment to the date of its enactment. It is conclusive that Congress assumed that "inherited lands' were included in the extension of restrictions by Section 19 of the Act of 1906, with the right of sale as provided by the last sentence of Section 22 thereof, or that if these lands are not in purpose included in the provisions of Section 19 of the same Act, that the said provision of Section 22 is amply sufficient within itself to impose a restriction upon that class of lands to continue after the expiration of the period of re-

strictions fixed by the Supplemental Agreement. It can, therefore, very correctly be concluded that Congress has in this latter Act interpreted the legislative intent of the Act of 1906, and this interpretation and construction by Congress will doubtless now, as in the past, receive great consideration by the court.

This court has in several instances given expression to the principles that control in determining the effect of such legislation. In Alexander v. The Mayor, etc., 5 Cranch, page 1, this court, by Mr. Chief Justice Marshall, uses the following language:

"Without deciding this question as depending merely on the original law, it is to be observed that Acts *in pari materia* are to be construed together as forming one Act. If in a subsequent clause of the same Act provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent Act on the same subject affords complete demonstration of legislative sense of its own language, the rule which has been stated, requiring that the subject should be incorporated into the foregoing Act, is a direction to courts in expounding the provisions of the law." (l. c., p. 7–8.)

Again, this court, by Mr. Justice Wayne, in The United States v. Freeman, 3rd How., 556, Syllabi 1 and 2, said:

"Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.

And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." (See also l. c. 564–565.)

Again, in Koshkonong v. Burton, 104 U. S., 668, this court, by Mr. Justice Harlan, quotes approvingly from the opinion of Mr. Justice Miller in Stockdale v. Insurance Company (20 Wall., 331), as follows:

"Both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may, in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional rights of the party concerned are violated." (l. c. 679.)

Again, in Cope v. Cope, 137 U. S., page 682, this court, by Mr. Justice Brown, uses the following language:

"These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, but the later Acts should also be regarded as legislative interpretation of the prior ones;" citing 3rd How. and 20 Wall, above.

The same principle was recognized by the Circuit Court of the Ninth Circuit in McFadden v. Mountain View Min. & Mill Co., 97 Fed., 670, where it is said:

"Moreover, the legislative construction of its own Act is always potent. 'If it can be gathered,' said the Supreme Court in U. S. v. Freeman, 3 How., 556, 564, 'from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislature declaration of its meaning, and will govern the construction of the first statute;'" quoting from a decision of the Supreme Court of Pennsylvania as follows:

"If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended."

Quoting also approvingly from Southerland on Statutory Construction, paragraph 283, as follows:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively, and construed together, as though they constituted one Act. This is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared; harmonized, if possible; and, if not susceptible to a construction which will make all of their provision harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the latest enactment." (2d Ed., Sec. 443.)

Also, quoting approvingly from another well-known author, Endlich on the Interpretation of Statutes, the first sentence of paragraph 43, which section we give here in full, as follows:

"Where there are earlier Acts relating to the same subject, the survey must extend to them, for all are, for the purposes of construction, considered as forming one homogenous and consistent body of law, and each of which explain and elucidate every other part of the common system to which it belongs. Thus not only may the entire body of the law on the subject be given the effect of a harmonious whole, by restraining, enlarging or qualifying conflicting words in any particular portion of it, by reference to other portions, so as effectuate the obvious intention of the law; but where there are irreconcilably conflicting clauses in the same statute, a comparison with other statutes upon the same subject may point out those clauses which are in harmony with such legislation as designed to prevail."

We also call attention to a late case in which a later statute is said to throw light on the meaning of an earlier statute on the same subject and was considered in determining the meaning of the earlier statute.

United States Fidelity Co. v. Kenyon, 204 U. S., l. c. 359.

ON PROVISOS.

It will be contended by defendants in error that the last sentence in Section 22 of the Act of April 26, 1906, is a proviso and that its effect is, therefore, only a restriction upon the grant of authority to alienate and the method thereof contained in the preceding part of the section in which it occurs. This sentence reads as follows:

"All conveyances made under this provision by **heirs who are full-blood Indians** are to be subject to the **approval of the Secretary of the Interior,** under such rules and regulations as he may prescribe."

This provision is not in form a proviso and we contend that it does not fill the office of a proviso within the intention of Congress, and, on the other hand, in case it should be given that effect, it is still not subject to the construction and norrow application contended for by the defendant in error. Even a proviso in a statute often has an effect which restricts or enlarges the scope of the entire Act. The application of such provisions is not always limited to the matters only in the section in which they appear. They sometimes have as much force even when attached or subjoined to a paragraph of a statute as they would if standing alone in an independent paragraph.

When the scope and purpose of this Act and the manifest intention of Congress are considered, we

believe it will be concluded that this provision of Section 22 has the full effect that its words import in providing the only method by which inherited lands of full-blood Indians may be alienated; and if inherited lands are not in purpose included in the provisions of Section 19 of the same Act, that the said provision of Section 22 is amply sufficient within itself to impose a restriction upon that class of lands to continue after the expiration of the period of restriction fixed by the supplemental agreement, and that by virtue of such provision in Section 22, such lands could be alienated only upon the approval of the Secretary on and after August 8, 1907, the day on which the restrictions imposed by the Supplemental Agreement expired. No other construction of this provision can be harmonized with the other provision of the same Act, especially Section 23 thereof, and with the provisions of Sections 8 and 9 of the act of 1908, heretofore referred to.

If this clause of Section 22 is an independent provision, as we maintain that it is, then it is effective for all the purposes of prescribing the only manner in which inherited lands can be alienated by a full-blood Indian on and after August 8, 1907, to the full extent that the provision of that Act, seeking to extend restrictions upon this class of lands are within the constitutional powers of Congress to enact; but as the question of the validity of this law will be discussed in another part of the brief, we here, assuming that the law is valid, refer the court to the line of authorities which we think are controlling as to the meaning of this particular clause of Section 22, even though the same be considered a proviso.

A noted author, **Black on the Interpretation of Laws,** gives the following rule for the interpretation of such statutes:

"Although as just stated the appropriate function of a proviso in a statute is to restrain or modify the enacting clause, and it should be confined to what precedes it, yet when from the context and from the comparison of all the provisions relating to the same subject-matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and an effect beyoud the phrase immediately preceding; it will be construed as restraining and qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section without regard to its position and connection. Hence the proviso may qualify the whole or any part of the Act, or it may stand as an independent proposition or rule, if such is clearly seen to be the meaning of the legislature as disclosed by an examination of the entire enactment." (Section 110.)

In speaking of such provision in statutes, this court used the following language:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the genral provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.

Georgia Banking Company v. Smith, 128 U. S., l. c. 181.

Again, in Chesapeake and Potomac Telephome Company v. Manning, 186 U. S. 242, this court announces the same principle and quotes approvingly the above language of this court.

The same principle is re-announced in United States v. Whitridge, 197 U. S., l. c. 143. In the latter case the court again refers to the principle of Georgia Banking Co. v. Smith, above, as being applicable to a provision of statute in the form of a proviso, and uses this language:

"While no doubt the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."

In the light of all this legislation upon the subject it seems almost idle for defendants in error to contend that the only purpose of the last sentence in Section 22 of the said Act of 1906 was to provide for the method of alienating this class of lands during the short interval between the taking effect of the Act, to-wit: April 26th, 1906, and the expiration of restrictions under the Supplemental Agreement, to-wit: August 8, 1907, a period of approximately fifteen months; and likewise idle to contend that the operation of Section 23 was intended to be limited to the same brief period. This becomes more apparent when the Act of 1908 is examined with a view of determining the purpose of Congress and the meaning attributed by Congress to the earlier Acts. Section 8 of the Act of 1908 provides for a specific amendment of Section 23 of the Act of 1906, changing the method of approving wills which devise the real estate of full-blood Indians to strangers to the law of inheritance in force, so that a judge of a County Court in the State of Oklahoma under said Section 8

may perform the function vested in a judge of the United States Court of the Indian Territory, the latter court having ceased to exist upon the coming of statehood, and the County Court of the State of Oklahoma having been established to succeed to the functions of the other court when it passed out.

This amendment contained in Section 8 of the Act of 1908 was intended to continue the operation of the said Section 23 of the Act of 1906, but was passed long after Section 23 had ceased to be operative according to the contention of defendants.

Again, if restrictions upon "inherited lands" of full-blood Indians expired on August 8th, 1907, as defendants contend, what will they say was the purpose of Section 9 of the Act of 1908? Will they contend that Congress did not know that, under its former Acts, restrictions had already expired, or will they assert that Congress simply attempted to accomplish the purpose of reimposing restrictions which had already expired? Of course, we realize that the rights of plaintiff in error in this case do not rest upon the said Section 9, as the transfers sought to be invalidated in this proceeding were made prior to its enactment, but, as recently said in U. S. Fidelity Co. v. Kenyon, 204 U. S., 349, and other cases cited in the same connection, this latter Act throws light on the meaning of the former Acts. Section 9 of the Act of 1908 provides that the death of an allottee of the Tribe shall operate to remove all restrictions upon the alienation of said allottee's lands with the following proviso:

"That no conveyances of any interest of any **full-blood Indian heir** in such land **shall be valid** unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee, etc."

These two sections, 8 and 9, taken together, therefore, makes it necessary that a will executed by a full-blood Indian, devising his inherited lands to strangers, shall be executed with like approval of a deed conveying inherited lands, that is, before the same judge.

Or will defendants contend that between the expiration of the five-year restriction of the Supplemental Agreement and the taking effect of the Act of 1908, this class of lands were alienable unconditionally, but that since the Act of 1908 they are only alienable as provided in the latter Act? This would mean that Congress purposely enacted legislation to the effect that free alienation should exist on these lands between the expiration of the restrictions of the Supplemental Agreement, August 8, 1907, and the taking effect of the Act of 1908, a period sufficiently long, under the conditions existing in the Indian Territory at the time, for the "speculator" to get contracts and conveyances upon all of this class of lands; and that after this is all accomplished, Congress then intended by Section 9 of the Act of 1908 to impose restrictions to prevent an evil thus already accomplished. Such a theory would indeed approach absurdity. But such would seem to be the legislative plan if the position of defendants in error is correct.

UNIFORMITY AS TO ALL FULL-BLOODS THE CONGRESSIONAL PLAN.

We now call attention to these statutes in the order of their enactment, with the view of pointing out a consistent purpose on the part of Congress to preserve a uniform and continuing control over the lands of full-blood Indians, of all the Five Tribes,

derived from the tribal estate; and also submit some authorities which we believe announce the principles that must control in determining the construction that this legislation must receive as a whole if the entire purpose of Congress is to be given the effect most reasonably and certainly intended, in view of all the circumstances of its enactment.

As appears from the foregoing, both Section 7, of the Original, and Section 16 of the Supplemental, Creek Agreement, imposed restrictions upon the alienation of the "inherited lands" of full-blood Indians.

Section 19 of the Act of April 26th, 1906, prohibited "full-blood Indians" from alienating the lands allotted to them for a period of twenty-five years. This section is a legislative declaration of the incompetency of the full-blood Indian, as such, to sell or alienate his lands. It imposes a complete disability on full-bloods as a class.

Section 20 of the same Act prohibits full-blood "allottees" from leasing their "lands" for more than one year without the approval of the Secretary of the Interior. This section imposes a disability on on an "allottee" as to all his lands.

Section 22 of the same Act removed restrictions from inherited lands of Indians generally with the exception that the last sentence of the section by way of an addition to its provisions declared that all conveyances made under this provision by "heirs who are full-blood Indians" are subject to the approval of the Secretary of the Interior under rules, etc.

For how long a period is such approval required? Until otherwise provided by Congress, as a matter of course, as it possesses the only authority over the subject.

Section 29, same Act, repeals all Acts in conflict with its provisions, thus leaving said Section 22 alone to prescribe the rule for alienation of inherited lands of full-bloods.

Section 23 of the same Act provided that every person (Indian) of sound mind, etc., might devise his lands and property by will, but, provided further, "That no will of a **full-blood Indian** devising **real estate** shall be valid if such will and testament disinherits the parent, wife, spouse or children of such full-blood Indian unless acknowledged before and approved by a Judge of a United States Court for the Indian Territory, or a United States Commissioner."

Section 8 of the Act of Congress approved May 27th, 1908, enacted after statehood amends the above Section 23 by providing for the approval of the wills of "full-blood Indian heirs" by a Judge of a County Court of the State of Oklahoma."

Section 9 of the said Act of May 27, 1908, provides that the death of an allottee shall operate to remove restrictions upon the alienation of his lands, but provides "That no conveyance of any interest of any **full-blood Indian heir in such land shall be valid unless approved** by the court having jurisdiction of the settlement of the estate of said deceased allottee, etc."

A consideration of this legislation as a whole must lead inevitably to the conclusion that Congress did, in fact, intend to maintain restrictions upon the inherited lands of full-blood Indians; otherwise, it would be impossible to account for so many positive declarations upon the subject which either directly proclaim the fact or assume its existence. At the date of the passage of the Act of April 26th, 1906, the land in controversy had been contiuously under governmental control since the Louisiana purchase of which it was a part. This control never ceased dur-

ing its occupancy by the tribe, and never ceased when allotted to the members thereof from whom plaintiff in error inherited it; and was over it at their death and at the date of the passage of the latter Act by virtue of the said Supplemental Agreement. Section 22 of the Act specifically provides the only method of its alienation. Section 23 specifically provides the only method by which it can be devised by last will. Section 8 of the Act of 1908 amends the laws as to the approval of wills, on the theory, of course, that such lands are yet subject to the authority of the Government. Section 9 of the latter Act removes the restrictions from all inherited lands, assuming, certainly, that they exist, but specifically provides that conveyances of such lands by full-blood Indians shall be made only on approval by the court having jurisdiction of the estate of the decedent. Will such a continuous duration and assertion of sovereign authority be deemed abandoned by implication?

Now, what does or can all this mean, if not that Congress intended through the entire period covered by these enactments, to reserve and maintain this limited authority of the Government over these lands? No other conclusion is consistent with any coherent or rational purpose on the part of Congress, the branch of the Government charged with the primary duty in the premises of making proper provision for the status of the lands and the welfare of the Indian.

No answer has yet been made to the position here assumed, except that in one Section only, (19), in the entire chain of Acts and provisions on the subject, the term "inherited lands" is omitted. While every other consideration involved and every legitimate aid in the determination of the legislative intent, points with unerring certainty to the fact that the real purpose

of Congress was to include this class of lands in the limited restrictions provided and retained for the protection of the full-blood Indians. They are included within both the spirit and the reason of the law and are within the letter of all provisions, but the one. We, therefore, insist that, if the purpose of Congress to maintain restrictions upon inherited lands of full-blood Indians can be determined by what it has done in numerous efferts to accomplish it, then that purpose cannot be obscure when all this legislation is considered.

We have heretofore cited and quoted from some decisions of this Court showing the effect a later Act or provision may have in determining the meaning and legislative intent of a former Act or provision. But we shall now take the liberty of referring to the language of a few eminent authors on the interpretation and construction of laws and to additional decisions of this Court, which we think most clearly warrant the construction of this legislation contended for by plaintiff in error.

Southerland on Statutory Construction (2nd Ed.) lays down the following rules:

"The Courts construed remedial statutes most liberally to suppress the mischief and advance the remedy. This principle operates to exclude as well as to include cases in furtherance of the law makers' intention. That which is not in the purpose or meaning, nor within the mischief to be remedied is not included in the statute even though it be within the letter. The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the Legislature intended to suppress. In doing so, they often go quite beyond the letter of the statute. What is within the intention is within the statute, though not within the letter; and what is within the letter, but not within the intention is not within the statute." (Section 585.)

"The intention is not something evinced *de hors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had, and that intention, when satisfactorily ascertained, is the design to which the letter is subordinated, and it is ever to be borne in mind that the intention is be collected from the words, the context, the subject matter, the effects and consequences, the spirit and reason of the law and other Acts *in pari materia*. (Sec. 586.)

"A statute extends no further than it expresses the legislative will. When it is held to embrace a case which is within its spirit, though not within its letter, it is not meant that the courts have authority to extend a statute to cases for which it does not by its words provide or beyond the sense of its language. * * * The modern doctrine is, that to construe a statute liberally, or according to its equity, is nothing more than to give effect to it according to the intention of the lawmaker as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the Act; so it may restrain the general words to exclude a case not within that purpose." (Section 589.)

"In statutes the sense signified is the law: * * * Where the intention of the Act is manifest, particular words may have an effect quite beyond their natural signification, in aid of that intent." (Section 590.)

"When the scope and intention of an Act are ascertained by all the aids available, words whose ordinary acception is limited may be expanded to harmonize with the purpose of the Act. This interpretation is admissible of statutes generally, but has a more liberal application to remedial and some other statutes which are liberally construed. It is applied to every case within the object of the Act, if it can reasonably be brought within its language. (Section 592.)

"It is to be observed that in the comparison of different statutes, passed at the same session or nearly at the same time, this circumstance has weight, for

it is usually referred to as indicating the prevalence of the same legislative purpose as rendering it unlikely that any marked contrariety was intended. But whether the prior statutes is recent or of long standing, it must yield if there is a conflict. * * * Statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*, and should be construed together, and effect should be given to them all, although they contain no referenee to one another and were passed at different times. Acts *in pari materia* should be construed together, and so as to harmonize and give effect to their various provisions. This is especially the case when the Acts are passed at the same session. * * * Statutes constituting a system should be so construed as to make that system consistent in all of its parts and uniform in its operation.

Where statutes are part of a general system, relating to the same class of subjects and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. A statute must be construed with reference to the whole system of which it forms a part." (Section 443.)

Black on Interpretation of Laws, speaks on the rule as to liberal construction as follows:

"Liberal construction on the other hand expands the meaning of the statute to embrace cases which are clearly within the spirit or reason of the law or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used; it resolves all reasonable doubts in favor of the applicability of the statute to the particular case." (Section 113.)

Again, Endlick on Interpretation of Statutes, announces the following rules:

"The rule requiring the interpretation of a statute in the light of and with reference to other *in pari materia*, has a peculiarly appropriate application to Acts upon such kindred subjects passed at the same

session of the Legislature. Indeed, in construing a statute, the entire scope of the legislation *in pari materia* of that session should be drawn into consideration." (Section 45.)

"Whenever the language admits of two constructions, it is obvious that the more reasonable of the two should be adopted as that which the Legislature intended. * * * On the contrary the presumption always is, where the design of an Act is not plainly apparent, that the Legislature intended the most reasonable and beneficial interpretation to be placed upon it.

It is obvious that the administration of justice requires something more than the mere application to the letter of the law designed for some particular class of ordinary cases to all others, however modified by accident or withdrawn by extraordinary circumstances from the spirit of its enactment." (Section 258).

"It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore them; to give them operation if the language will permit instead of treating them as meaningless. But beyond this the duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute or to techincal rules of construction. Hence, in the construction of statutes an interpretation is never to be adopted that would defeat the purpose of the enactment if any other reasonable construction can be found which its language will fairly bear." (Section 265.)

"Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentences," etc., etc. (Section 295.)

"When the expression in a statute is special or

particular, but the reason is general, the expression should be deemed general." (Section 322.)

"What is within the plain intention of the makers of a statute, not falling under the rule of strict construction, being as much within the statute as if it were within the letter." (Section 320.)

The statutes under consideration are all *in pari materia* as they apply to the same general subject of legislation and each enactment and provision constitutes a part of the same system of laws. The rule as to such statutes as fully stated in the foregoing shows that they should be construed liberally and all together with the view of accomplishing the common purpose.

The principles applied by this court many times in determining the construction of statutes, if applicable here, as we contend they are, must resolve the issues in this case in favor of plaintiff in error. The court has in many instances been compelled to vary the letter of the law to conform to its spirit, and to take a view of the entire scope, not of a single Act or provision, but of all Acts and provisions upon a given subject of legislation, in order to gather its true meaning and to carry out the real intent and accomplish the whole purpose of the lawmaker.

We invite attention here to the following expressions of the court:

"In the exposition of the statutes, the established rule is that the intention of the law-maker is to be deducted from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject they are all to be taken together, and one part to be compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system.

Resort may be had to every part of a statute, or, where there is more than one in pari materia, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."

Kohlsaat v. Murphy, 96 U. S., l. c., 159.

"It is true that if the language used in that last clause be given its broadest and widest application it would include all owners of real estate which had been sold in any portion of the country under the provisions of the direct tax Act. But we think our perusal of the whole Act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole Act. Under such circumstances it is not only the right but it is the plain duty of the court to limit by a proper construction the otherwise boundless application of the general language used in the statute. As well said by Mr. Chief Justice Taney: 'It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.' Brewer v. Blougher, 14 Pet. 178 at 198; Petri v. Commercial National Bank of Chicago, 142 U. S., 644, 650."

McKee v. United States, 164 U. S., l. c., 293.

"I agree to that rule in its true and sober sense; and that is, statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to classes, or in giving them the narrowest interpretation where the mischief is to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires

the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature."

Johnson v. Southern Pacific Co., 196 U. S., l. c., 18.

"Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter." United States v. Freeman, 3 How., 556. 'The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called into aid that intent.' Chief Justice Marshall in Durousseau v. United States, 6 Cranch, 307."

Hill v. American Surety Co., 200 U. S., l. c., 203.

We believe these principles are applicable in all respects to the matter under consideration and establish beyond question the position here contended for by plaintiff in error.

ANALOGOUS QUESTIONS CONSIDERED BY THE COURT — PRINCIPLES ANNOUNCED CONTROLLING.

We call attention next to an early case, that of Smith v. Stevens, 10 Wall. 321, the decision in which in effect holds that a restriction may be imposed upon the alienability of land long after the title vested in the Indian. The facts are as follows:

On June 3rd, 1825, a treaty was made between the United States and the Kansas Indians. There was reserved to each of a number of half-breed Indians named in the treaty a specified allotment of land out of the land ceded by the Indians to the United States, and a provision also prohibiting the nation of Indians from disposing of any of the reserved lands. Victoria Smith was one of the reservees. She still owned her land on May 26, 1860, when Congress passed an Act vesting all the title and estate of the United States in and to those allotments in the reservees and provided that nothing in the Act should give force or effect to any contract previously made for the sale of the lands by the reservees or their heirs; and the Act, also, provided that if any of them should desire to sell their allotments they might do so on the approval of the Secretary of the Interior, etc.

A few months after the passage of this Act, to wit: on August 14, 1860, Victoria Smith attempted to sell her allotment and made a deed therefor without the approval of the Secretary. In July, 1862, Congress repealed the provision of the Act of 1860, requiring the sale of lands to be approved by the Secretary of the Interior.

Victoria Smith brought an action of ejectment against the person to whom she had attempted to sell her land, as aforesaid, on the 14th day of August, 1860. The validity of that attempted sale was the question presented to this court.

Whether the prohibition in the original treaty against the Indian nation selling the land of the reservee, also, prohibited the reservee from selling, was the first question considered by the court; but the conclusion of the court was reached independ-

ant of that question, as is evidenced by the following language:

"It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the Act of Congress of the 26th of May, 1860, which relieves the subject of all difficulty. This Act vested the title of the United States to the lands which the treaty had set apart for the use of the half-breeds, in the reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any future disposition of them, except by the Secretary of the Interior on the request of the party interested."

The right of Congress to impose restrictions upon lands vested in the individual Indians by treaty and kept by them for 35 years thereunder is thus clearly recognized; and the right to maintain restrictions upon lands after the United States has entirely relinquished all their interest and title in the lands, is also clearly recognized.

Again: "It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; **and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, cannot be questioned.** (Black face ours.) Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts, for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress, in conferring the authority to sell on the Secretary of the Interior, to save the lands of the reservees from the cu-

pidity of the white race; and, if the provisions of the treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from organized communities, followed them to Kansas. In this condition of things Congress acted, and the necessity for legislation on the subject, if, indeed, there were need of any, is shown by the defense, which is interposed to this suit." * * *

Again: "It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser."

We believe that the principles above announced in this well considered case go far toward sustaining the position for which we contend. It answers the contention of defendants in error, as to the right to impose restrictions after the government relinquishes its interest in the land, and likewise their contention, that restrictions are inconsistent with the fee simple title. The Kansas Indians maintained the tribal status, but the "reservees" owned their allotments individually in fee simple. The Creek nation also maintains its tribal status (34 Stat. 822), and the allottees own their allotments individually in fee simple. In both instances the government had specifically relinquished all its interest in the lands, in that held by the "reservees" of the Kansas nation and in that held by the "allottees" of the Creek nation. The many points in common in the two situ-

ations, makes the above case valuable as a precedent for the case now under consideration.

The Circuit Court of Appeals, Eighth Circuit, has considered a question very analogous to the one under consideration here, in the case of Goodrum, *et al.* v. Buffalo, 162 Fed. 817. That case involved the right of an Indian heir to alienate inherited lands allotted to a Quapaw Indian under the Act of Congress of March 2, 1895 (28 Stat. 907). Under this Act the legal title was conveyed to the Indian under a patent with the proviso that the allotment shall not be alienable for a period of twenty-five years from and after the date of the patents. Prior to the expiration of the twenty-five years an attempt was made in the manner set out fully in the statement of the case and opinion to have the inherited allotment of one Arthur Buffalo alienated and deeds were procured from him and likewise a judgment of the United States Court in the Indian Territory was procured upon stipulation designed to aid the transaction by means of a decree which would operate as an estoppel against any attack that might later be made upon its validity.

It is true that the provision of the allotment Act in the case before the Court of Appeals differed in some respects from the Act under consideration here, that is, to Section 19 of the Act of April 26, 1906, but the language used by Congress in fixing restrictions upon the alienation of the Quapaw lands is not different in effect under this decision from the language used in Section 16 of the Supplemental Creek Agreement, which reads:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken or sold, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the

approval of the supplemental agreement except with the approval of the Secretary," etc.

The Act imposing restrictions upon the Quapaw allotments did not mention heirs but simply said "allotments shall be inalienable," etc. Section 16 of the Creek Agreement, as will be observed, says the lands allotted, etc., shall not be "alienated by the allottee or his heirs." The Court of Appeals in the Buffalo case held that the restrictions run with the land under the Quapaw Act, and that an heir to one of the allotments could not make a valid conveyance to same before the twenty-five years expired.

Section 19 of the Act of April 26, 1906, commonly known as the "McCumber Amendment," like the said Act relative to the Quapaw allotment, likewise, does not mention heirs. The language of these two Acts still differ literally in another particular. The Quapaw Act says the "allotment shall be inalienable." The McCumber Amendment says the full-blood Indian "shall not alienate the lands allotted to him."

If the real purpose of Congress is not to be lost sight of, we believe that this is a distinction without a substantial difference. The purpose of Congress was manifestly, as stated in the Buffalo case, to preserve this land to the use and occupancy of the Indian during the period thought necessary by Congress for his preparation and qualification to deal with it on his own account, and to protect him against the consequences otherwise obvious; and that being the purpose of it all, the controversy as to whether the restriction is upon the Indian or upon the land is entirely fruitless. Whether in terms it is the one way or the other, the object to be attained is exactly the same. We think under the language of either statute that the restriction is upon both in the sense, that if

a particular person is prohibited from selling a particular tract of land, both are affected; and that if a particular tract of land owned by a particular person is subject to a restriction against alienation, both are likewise affected. The provisions are in purpose and effect substantial equivalents. The distinction attempted is altogether too fine drawn and the point too hypertechnical to be available in defeating the general and beneficent purpose of Congress in dealing with a subject of this character.

United States v. Allen (C. C. A.), 179 Fed. 14.

We believe that the conclusion reached by the Court of Appeals in the Buffalo case to the effect that an heir could not alienate inherited lands under the Quawpaw Act providing that "allotments shall be inalienable" is applicable to the said Section 19 of the Act of 1906 which says that the full-blood Indian shall not "alienate the land allotted to him" and that, therefore, inherited allotments of the class of Indians designated in said Section 19, are under the same restriction as direct allotments by virtue of the said Section. In the above case the Circuit Court reviews a number of decisions in harmony with the conclusion reached and we respectfully invite the attention of this Court to that decision and the authorities considered.

In support of proposition III, contended for by plaintiff in error, we desire to direct the attention of the court particularly to a few of the authorities cited thereunder. It is quite possible that no case exactly in point and on all fours as to the two questions involved here can be found in the decisions of this, or the inferior courts. Some decisions have

been rendered, however, on facts sufficiently analogous to give them much value as precedents.

We direct attention here to the decision in Wiggan v. Conolly, above, 163, U. S. 60. In that case, it appeared that a treaty had been negotiated between the government and the Ottawa Indians in the State of Kansas in 1862 providing for the allotment of their lands in severalty and also that upon the receipt of a patent to their lands and the dissolution of the tribal government, which should take place at the end of five years, they should all become citizens of the United States, etc., etc. Before the expiration of the said five years negotiations were begun between the government and the tribe for the extension of the time for the dissolution of the tribal government. The Agreement was not concluded, however, until after the five years mentioned in the original treaty expired. This latter treaty, called the treaty of 1867, was not completed and proclaimed until October 14, 1868. It was contended in that case that there was no power in the government to make the treaty of 1867 so called, or to extend the time for the dissolution of the tribal government beyond the five years provided in the original Agreement and that as these Indians were citizens of the United States, by virtue of the original Agreement, and also of the State of Kansas, the subsequent negotiations were not effective. This argument was made in the interest of sustaining a sale of the lands of a minor which had been made through a proceeding in a Probate Court in Kansas. Had there been no further Act on the part of the government and the Indians after the treaty in 1862, this sale would doubtless have been valid as the tribal government would have been dissolved; the Indians would all have held their lands by fee simple title and would all have been citizens

of the United States. The treaty of 1867, however, added a provision not contained in that of 1862 in the respect that the lands of a minor should not be alienated during his minority and it was this provision of the latter treaty that it was sought in that case to have declared invalid.

In discussing that feature of the question this language is used in the opinion:

"This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

It will be observed in this connection, that the Act of April 26, 1906, here in controversy, was passed before the dissolution of the tribal government of the Creek Tribe, and while their tribal affairs were unsettled. The tribal government was extended by joint resolution on March 2, 1906, as heretofore set out, and the Act was passed also before the period of restrictions imposed by the Supplemental Creek Agreement had expired.

It is specifically ruled in the above case that the fact of the allottee holding title to his allotment did not affect the right of the United States to add with the consent of the Tribe a new limitation upon the right of alienation. Nor do we think that the consent of the Tribe was a necessary prerequisite to the

right of Congress to make further provision in regard to the matter. Had Congress acted prior to the expiration of tribal government and prior to the relinquishment of all control over the Indian and his lands, the Indian would have been bound. The consent of the Tribe was given to the provisions as to the extension of the tribal government and the imposing of further restrictions upon the lands of minors, and this fact is mentioned in the opinion. It will also be borne in mind that these transactions all took place at a time when all dealings with the Indians were conducted by treaty and prior to the Act of Congress of March 3, 1871, 16 Stat. 566, dispensing with the treaty and providing for the disposition of Indian matters by Acts of Congress. Under this Act, Congress may govern the Indian, may pass laws to promote his welfare without his consent.

Cherokee Nation v. Hitchcock, 187 U. S. 305.

The relation of the government to the Indian and the duty of the government are such that, independent of his will, Congress has declared its power to make such disposition for his welfare as it deems best so long as the tribe exists and the government has any control over the property which is the subject of the legislation.

ACT APPROVED BY INDIANS.

The legislation of April 26, 1906, was enacted upon this theory, as a matter of course, and did not provide for any Agreement of the Creek Tribe of Indians or any ratification after the Act. It was an Act passed for their benefit and protection and so understood by them, and was in fact ratified and approved by the Creek Tribe in the manner prescribed for all their legislative Acts. This fact does not appear in the

transcript of the record, and was not presented in the trial of the case below, but the evidence of their action is a public record in the office of the Commission to the Five Civilized Tribes, which is the authorized custodian of all their records and the agency of the Department of the Interior for such purposes. We, therefore, embody a copy of it here to be considered by the court for any purpose that it may be competent to serve. This resolution of the Creek National Council, as required by law, was duly signed by the proper officers of that body, approved by the President of the United States, and is as follows:

"Resolved by the National Council of the Muskogee (Creek) Nation, in extra session assembled; that Section nineteen (19) of the Act of Congress of the United States approved April 26th, 1907, (Public No. 129), which reads as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress; and for all purposes of the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection

of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before the removal of restrictions, be and the same is hereby declared void; Provided, further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee,"

is hereby ratified, confirmed and approved.

Be it further resolved that Section twenty-two (22) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129) which reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe,"

is hereby adopted, ratified and confirmed.

Be it further resolved that Section twenty-three (23), of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129), which reads as follows:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner,"

is hereby adopted, ratified and confirmed.

August 2nd, 1907.

DAVID ANDERSON,
Pres. House of Kings, Pro. Tem.

SAM. GRAYSON,
Clerk.

Concurred in August 2nd, 1907.

ALEX DAVIS,
Speaker House of Warriors.

MILDRED CHILDERS,
Clerk.

Approved August 3rd, 1907.

P. PORTER,
Principal Chief.

THE WHITE HOUSE,
Washington, September 17, 1907.

APPROVED:
T. ROOSEVELT.

I hereby certify that I am the officer having custody of the records pertaining to the Acts and Resolutions passed by the National Council of the Creek Nation and that the above and foregoing is a true and correct copy of a Resolution passed by said Council August 2, 1907, approved by the Principal Chief of the Creek Nation August 3, 1907, and by the President September 17, 1907, ratifying and confirming Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Okla., Feb. 28, 1910.

While this action on the part of the Tribe was not provided for in the Act of Congress relative to the extension of restrictions, it, nevertheless, shows the feeling of the Indian toward the provisions which are intended to accomplish that result. The Indian believed the Act was a protection to his property, and so intended by Congress and he responded in this spontaneous ratification.

FURTHER DECISIONS REVIEWED; GUARDIANSHIP, CITIZENSHIP, ETC.

We now call attention to the decision in the matter of Heff, 197 U. S. 488. This decision will be referred to by the defendants in error in support of their position that Congress was without power in this matter and that the Indian because of being a citizen of the United States holding legal title to his lands, that, therefore, all power of Congress over the subject had entirely ceased. We do not think this decision can be given any such effect, principally for the reason that those questions were not at issue in the case. In that case the question presented to the court was the right of the government to exercise a police power over an Indian citizen of the United States and the State of Kansas holding title to allotted lands. A prosecution had been instituted by the government for selling liquor to an Indian in violation of a Federal law, namely, the Act of January 30, 1897, (29 Stat., 506), providing a penalty for selling intoxicating liquors to an Indian to whom an allotment of land had been made while the title to the same remained in the United States, etc. The contention of the petitioner was that he was not liable to prosecution under the Federal statute, on the ground that the laws regulating the sale of liquor in a state come within the

police regulations of such State and that Congress could not assume a police regulation within the State in regard to that matter. This was the only question presented for determination in the case. There are however, in the course of the opinion some principles announced to which we call the attention of the court which we think are in line with the contention of plaintiff in error in this case. After reference to the Act of March 3, 1871, prohibiting a further dealing with the Tribes by treaty, it is said:

"From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Again, "Of late years a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

We think the above case most clearly recognizes the distinction between a personal guardianship over

the Indian and a control over his property and recognizes that the former may be abandoned and the Indian become subject to the police regulations of the State in which he resides long before the time when he can deal as one *sui juris*, and also that this personal guardianship may be abandoned and the Indian subjected to the police regulations of the State where he resides while yet retaining his tribal relation and his interest in tribal property and while the government still retains full and complete supervisory control over his lands. Upon this subject the court says:

"But it is said that the government provided that the Indian's title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property; but these are mere property rights, and do not affect the civil or political status of the allottees. In United States v. Rickert, 188 U. S. 432, we sustained the right of the government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly, an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted); and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a State court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

So it must be seen from the doctrine of this decision that a restraint upon the alienation of property does not affect those civil and political rights which are urged as a bar to the execution of the policy of the government to protect the Indian in the enjoyment of his property rights by restrictions or conditions upon alienation.

This doctrine considered in connection with the announcement in United States v. Rickert, referred to therein, must show conclusively a recognition of the divisible nature of the authority formerly maintained by the government over the Indian and his property and likewise must show that a maintenance of a complete guardianship over both the person and property is not requisite to the exercise of any authority. We understand from these decisions that the guardianship formerly maintained over the person of the Indian may be entirely abandoned and authority over his property retained. This is in harmony with the regulations in many of the States in such matters in regard to minors and incompetents and their property. It is sometimes necessary to have a guardian of the person and property. Sometimes a curator of the property only is required while the person, though incompetent, is permitted to enjoy his civil and political liberties without restraint of any kind; and so if it be the policy of the government to relinquish its guardianship over his person there would seem to be no objection to such course. It is, therefore, not necessary to establish here the technical relation of guardian and ward as to the person between the full-blood Indian allottees and the government in order to maintain that the government still has authority over their property; and although by the treaties and Acts of Congress providing for the allotment of these lands and the citizenship of the allottee the government has surrendered the person of the Indian to the police jurisdiction of the State where he resides, it by no means follows that because thereof the government has relinquished its authority over his property and that Congress is without further power to provide as it deems best for the pro-

tection of the Indian in its use and enjoyment in accordance with its policies.

Under the allotment Act of February 8, 1887, 24 Stat., 388, provision was made, among other things, for patent to issue in the name of the allottee and that upon living apart from the Tribe and upon the allotment, the Indian should become a citizen of the United States, with all the rights, privileges and immunities of citizens, and should be entitled to the protection of all the laws in the State where he resided. The Act provided that the patent for the allotment should be issued in the name of the allottee and be of the legal effect and declare that the United States would hold the lands in trust for his use for a period of twenty five years. Under this law, this court has several times held that the United States retained its authority over the allotment and that this authority was in no sense affected by the citizenship of the Indian. This was specifically held in the United States v. Rickert, 188 U. S. 432, and likewise in Heff's case, 197 U. S. 488. Under the allotment Act, applicable to the Creek Tribe of Indians, heretofore referred to the patent issued in the name of the allottee just as under the Act of 1887, but instead of the Act providing for the United States holding the lands in trust for the use and benefit of the Indians, a restriction was imposed by the law prohibiting the alienation of the land. We maintain that the authority of the government was thus reserved by reason of the restriction against alienation to the same extent and with like effect as under the Act of 1887 in which the trust was specifically declared. If the authority of the government was not reserved by this provision then the provision would be ineffective most certainly to accomplish the intended benefit. The Circuit Court of Appeals in the Ninth Circuit has expressed this

view of the matter; in National Bank of Commerce v. Anderson, 147 Fed. 87. The question presented in the above case was the effect of the Act of Congress of May 27, 1902, providing for the alienation of inherited lands of allottees under the said Act of 1887. In the course of the opinion, the court says:

"It is admitted that Henry Taylor is a citizen of the United States, is an Indian of the Puyallup Tribe, lives under the government or under official control. The land which was sold was allotted to James Taylor under the general allotment Act of 1887. That Act declared that the land should **not be alienated** by the allottee, within a period of twenty-five years from the date of the allotment. Under the terms of the Act, the allottee was allowed the use and occupation of the land, and the only limitation upon his title was the **restriction against alienation within the specified period.**" (Black type ours).

It was held in this case also that this trust over the land of the allottee attached to the proceeds of the sale of the inherited lands and continued the proceeds under the authority and disposition of the government for the benefit of the party entitled to it.

We maintain that a restriction imposed upon the alienation of an Indian allotment is a trust or power reserved to the government to protect that property for the intended use, and that such power is as effective for that purpose as though a specific declaration of trusteeship had been declared. The trust provided for in the Act of 1887 is said in the above cause to be in effect only a restriction against alienation. Why should a restriction be imposed at all if the government is to lose control and to lose its power to enforce the restriction? If the Indian is wholly abandoned and his interest placed wholly within his own keeping without any authority reserved to aid him, the restriction would then be a mere expression

and without effect for any purpose, because if he is responsible and competent to enforce a restriction he can, likewise, protect his interests without restrictions.

It will be clearly seen from the authorities, we think, that the authority of the national government over Indian matters is clearly divisable and that the government may entirely abandon its guardianship over the person of the Indian, and retain a curatorship, so to speak, or a form of authority over his property. This principle has been clearly recognized in the Federal Court in a late decision by Quarles, District Judge, in the following language:

"Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other, the management of his estate. We have seen it has been settled that the government may at any time terminate this relation of guardianship. It follows, therefore, it may at its pleasure, emancipate the Indian from personal control, and still retain the other function of managing and conserving his property. That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language employed in the Act of 1887, that no argument could make it plainer. The purpose of the government to protect the title of allotted lands has been declared with equal distinctness."

United States v. Hall et al., 171 Fed., l. c. 218.

The argument, therefore, so persistently advanced by defendants in error to the effect that the authority of the Government over allotted lands, under restrictions and held by Indians who are citizens, had entirely ceased because the personal guardianship of the Indian had been abandoned, is seen to be without the support of authority and, in fact, against all authority as well as without the support of reason. It was

also said, in Rainbow v. Young, (C. C. A.), 161 Fed., l. c. 837, by Vandevanter, Circuit Judge, speaking with reference to Indians having full citizenship and living upon allotments in the State of Nebraska made under the Act of 1887:

> "They are regarded as being in some respects still in a state of dependancy and tutilage which entitles them to the care and protection of the Governent."

In Goodrum v. Buffalo, 162 Fed., l. c. 822, in discussing the question of the effect of the citizenship of the Indian upon the authority of the Government to conserve his lands the court quotes approvingly the following language of Thayer, Judge of the same Circuit Court of Appeals, rendered as early as 1894, as follows:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States and entitled to the rights, privileges and immunities of citizens, while it retained, for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease or otherwise dispose of their interests in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character—that is to say, it is competent for a private person to make a conveyance of real estate, and to withhold from the donee for a season the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependant race like the Indians, who have always been regarded as the wards of the Government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit, without reference to the character of the title by

which it is held. The right to sell property is not derived from, and is not dependant upon, citizenship. Neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it."

The same doctrine has been announced by this court several times in the cases cited, and it would seem that the question is not open to further controversy.

Again, it will be contended by defendants in error that the Act of Congress of April 26, 1906, attempting to extend restrictions upon these lands is a violation of the rights of the Indian under the Agreement with the Government; and it will be pointed out that Section 16 of the Supplemental Agreement limited the period of restrictions to five years and that an extension beyond that period violates the rights of the allottees under the Agreement, and is, therefore, an Act of bad faith.

This argument is completely answered by a decission of this court rendered January 31, 1910, where the question of good faith in maintaining treaty rights was considered, in which it is said, in substance, that the good faith of the Government, in dealing with the Indian,

"would not be broken by a change believed by Congress to be for the welfare of the Indians."

Conley v. Ballinger, 216 U. S. 84.

NO UNIFORMITY UNDER THEN EXISTING LAWS.

Plaintiff in error has attempted, in what has preceded, to show by the legislation of Congress that the purpose had been to protect, in a greater degree than had been done in the separate Agreements with the Five Civilized Tribes, the full-blood Indians of all those Tribes, and that the purpose so to do was manifest when all the legislation, bearing upon the subject, is considered as one system; and that such legislation, if construed liberally and in the interest of the Indian, will protect the full-bloods in all their holdings of tribal lands and thus carry out the legislative plan. Allotment agreements were made with all the Five Tribes, except one in the year 1902; those with the Cherokees, Choctaws, and Chickasaws about July 1st, 1902, and that with the Creeks, June 30th of the same year, the Seminole Agreement having been concluded in 1898. It will be seen in a reference to these Agreements that the period of five years had originally been fixed for the expiration of restrictions upon the allotted lands generally, with exceptions in some instances of homesteads and the lands of minors. In the Choctaw and Chickasaw nations provision had been made in the Agreements for the gradual removal of restrictions, that is, for their removal from a part of the lands at one time and a part at another; and had there been no change inaugurated by Congress in reference to these matters, there would have been a vast amount of land belonging to the Indians on which restrictions would have expired in the summer of 1907, and this would have included much land belonging to full-blood Indians.

This exact situation was staring Congress in the face when the Act of April 26th, 1906, was passed,

and this act, it can reasonably be said, grew out of the necessity, as it appeared to Congress, of throwing additional safeguards around full-blood Indians. The error that had been made when the Agreements were entered into of permitting restrictions to be so soon removed from the lands of this class of Indians, became apparent and as said by this Court in United States v. Celestine, 215 U. S., 278, in reference to the Act of May 8th, 1906, extending the time at which allottees should be subject to State laws under the general allotment Act of 1887, it "is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty." So it may be said here that the Act of April 26th, 1906, now under consideration, is worthy of note as suggesting that Congress, in permitting restrictions to expire upon the lands of full-blood Indians at the time fixed in the various agreements had been hasty, and that the interest of those Indians demanded that additional legislation in the way of further protection to that class of Indians was imperatively demanded. It is evident, too, that the new Act was designed as a modification of and substitution for all previous legislation affecting the subject in any way in conflict with the Act. Sec. 29, Act April 26th, 1906, repeals all previous Acts in conflict with its provisions. It was doubtless intended that the late Act should supersede, unify and bring into a harmonious whole all previous agreements with the various Tribes, affecting this class of Indians.

We think upon the consideration of all the legislation affecting this subject in connection with the character of the subject dealt with in the Act of April, 26th, 1906, it will be concluded by the court that Congress intended and attempted to establish a uniform rule as to the protection of the full-blood Indians of

all the Five Tribes. Prior to this Act, much confusion, as well as a total lack of uniformity prevailed as will be seen by a reference to the various allotment Acts.

In the Choctaw and Chickasaw nations, the allotment of full-blood Indians descended subject to the restriction that the land should not be sold for less than the appraised value during the existence of the tribal government.

Under the Seminole Agreement, inherited lands did not become alienable until after the issue of a patent.

In the Cherokee nation, the homestead descended under Section 13 of that Agreement free from all restrictions upon alienation; and the surplus allotment in the latter nation was alienable on the expiration of five years from the date of the ratification of the Agreement, August 12th, 1902.

In Section 16 of the Choctaw-Chickasaw Agreement, allotments, excepting homesteads, could be alienated as follows: one-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years, all from date of patent, with the provision that it should not be alienated for less than its appraised value during the existence of the tribal government. The homesteads of the Choctaws and Chickasaws were inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment.

Under the Creek Agreement, restrictions expired upon all surplus lands, five years after the ratification of the Agreement, and proclamation by the President, making the date at which it would become alienable August 8th, 1907.

The statutes containing the agreements and provisions on these matters affecting the several Tribes, are as follows:

Cherokee, 32 Stat. 717;

Choctaw & Chickasaw, 32 Stat. 641, 643;
Creek, 32 Stat. 500;
Seminole, 30 Stat. 567, 568.

A comparison of these statutes with the Act of April 26th, 1906, discloses a most striking change in the policy of Congress. It will be seen from the earlier statutes that little, if any, attention or consideration was given to the question of the degree of blood as affecting the period of restrictions. The earlier enactments all proceeded upon the assumption, apparently, that all the Indians would be competent to sell their property without supervision on the expiration of the period of restrictions fixed by those Acts, the five-year restriction having the most general application; while an examination of the Act of April 26th, 1906, makes it equally clear that the protection of full-blood Indians as a class was practically the single and sole purpose of Congress. Restrictions on some of the full-blood lands had expired prior to the Act of 1906, and Congress had doubtless full knowledge of the consequences resulting to the Indian where that situation existed. The discussion of the bill in the Senate contained reference to a special committee report on the situation. It is likewise evident that Congress considered the status of the full-blood Indian of all the Tribes about the same relative to his incompetency to deal in his lands, and that the variation as to his rights in that regard, found in the previous statutes, had no legitimate basis; and that this class of Indians could be better protected under a law having a uniform application to all the Tribes. It was this State of affairs that called for the explanation of Senator Clapp, chairman of the committee, when he stated:

"Under the laws and treaties down there, the different tribes would, before this bill passes, come into

the right of alienation by degrees—some of them in one year, some of them in two years. There were different rules; **but we brushed that all aside and adopted this plan.**" (Black type ours.) (40 Cong. Rec., p. 5174).

HISTORICAL CONSTRUCTION.

Something has been said in the brief of defendants in error in regard to the change which took place in Section 19 of the Act of April, 1906, in its progress through the two branches of Congress, to which we will give attention later, but we desire to suggest here that the section as it finally passed carries upon its face unmistakable evidence that Congress considered the full-blood Indian incapacitated to deal with the white man concerning his own property without the supervision of the Government. The idea conveyed by the language and form of the statute is not that Congress had in mind a particular tract of land as an original allotment or as an inheritance, but that it had in mind the incapacity of a class of Indians. The language of the Act is levelled directly at the fact of his incompetency. It is as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act unless such restrictions shall prior to the expiration of said period be removed by Act of Congress."

As the very language of the Act strikes down the power of the full-blood Indian to alienate, etc., and as the purpose was to restrain the exercise of such power by full-blood Indians, it may well be concluded that the term "lands allotted to him" was used by

Congress in a generic sense and was intended to comprehend all allotted tribal lands owned by him which would, of course, include lands inherited by him. Unless this is true, then a class of lands coming wholly within the reason of the law and under the general purpose of the Act is not within that particular section of the Act. That the disability of the full-blood Indian as a class was the subject uppermost in the mind of Congress when it was passed, and that Congress was not considering the question of imposing further restrictions upon a part of the lands of full-bloods and permitting them to expire upon another part, is evident from what was said at the time the matter was under discussion in the Senate. In answer to a question by Senator Money, Senator McCumber said:

"Mr. President, the Senator cannot see but that there is some scheme in this; that somebody is getting something out of it. I am responsible on this floor for that amendment (referring to Secs. 19). It had not been suggested to me by any person upon the face of the earth, only as I have become acquainted with the Indians, and as I have become more and more impressed, especially since I have been in Congress, by an almost systematic effort to rob the full-blood and every other Indian of all the property that he may have.

The Senator states that the Indian is doomed. Perhaps he is. I admit that finally he is; but I insist that it is the duty of Congress to protect him and shield him just as long as it can. I go a step further and say, if we have made any treaty or any agreement which we have since found to be inimical to the interests of the Indians, it is our moral duty to reject that agreement; it is our moral duty to pass a law that will protect him against the rapacity of the white settler. Whether that settler will get that land away from the Indian, even though we put a restriction of twenty-five years against alienation,

I am not prepared to say. However, I do not believe that, if you do continue that restriction, the Indian is going to be thrown a pauper upon the Government so long as that restriction continues. I do believe, however, aye, I know it, that the moment you remove those restrictions, you have got a pauper to deal with, and to deal with him as you will. Any man who knows anything about the Indian's character—any man who knows the history of the Indians, for the last fifty or seventy-five years—will not deny the fact that that is going to be the result.

Mr. President, the question arises as to what is the condition of those Indians in the Indian Territory? I will not attempt to speak with absolute certainty as to what will be the final decision of the Supreme Court with respect to what rights the Indian has obtained by reason of citizenship, and what he has forfeited by reason of citizenship. I do know that so far as our treaties are concerned, the Supreme Court has again and again held that so long as we can deal with the Indians we are under no obligation to maintain the condition that we create by any one treaty or agreement. * * *" (40 Cong. Rec., p. 5175-5176).

After referring to several decisions of this court in regard to the right of Congress to deal with the property of the Indian after allotment, the Senator proceeded as follows:

"If that is true, it seems to me there is ground for holding that we ought to protect them; and I say again to the Senator, you can talk all you are a mind to about civilizing the Indians the same as you would a white man—by making him get down and work himself up, but he never will do it. You can take a white man, and he may be a pauper, and that may be for his best interest, because it places him upon his own responsibility. But you must remember that he has an inheritance of thousands of years which has given him the energy, the determination, the industrial character to build himself up. The exact opposite has been the history of the red-man; and be-

cause he has those characteristics we may never hope to make him the equal of the white man. If we will admit that, and proceed to make the very best Indian we can out of him, and observe our moral duty, remembering that we have stolen the continent from him—if we do our duty and continue his poor life as long as we can, we will always provide a home for him; give him a home upon terms under which he can not sell it, so that he can come back to it whenever he finds that there is no other place on the face of the earth to lay his head.

Mr. President, that is the spirit which backs the introduction of this amendment, and it is the only spirit that has controlled in seeking to make this amendment a law by passing it through both Houses of Congress, in order to protect the Indians, in the future at least, for as many years as possible."

By Senator Money:

"Mr. President, I give full credit to the zeal and humanity of the Senator from North Dakota (Mr. McCumber), and I especially indorse and cordially approve all the latter part of his remarks. I think he has stated the truth about the matter with great force and with great clearness and with great eloquence. I have already given both committees credit for doing what they think is best for the Indians." * * * (40 Cong. Rec., p. 5176).

This entire discussion was with reference to the provision of Section 19 of the Act of 1906, commonly known as the "McCumber Amendment," which had reference specially and exclusively to full-blood Indians as a class and their disability as a class, not a word being said in the entire discussion about any particular quantity of land allotted directly or inherited allotments. As the discussion continued, Senator Teller, said:

"If we can protect these Indian lands longer, we ought to do it. Whether we can add anything to what has already been done, whether, when the govern-

ment has given a patent, subject to a limitation of ten years, we can add another ten years, or five years, is a question I think we will probably leave to the courts to determine. It would be a good thing for the Indians if we could do it. Whether we can or not I am not prepared to say." (Vol. 40, p. 5177)

Senator Spooner said:

"I understood the Senator the other day to say that there were a great many Indians down there, not full-bloods, who were as capable as white men of transacting business and protecting themselves."

Senator Teller:

"Undoubtedly."

Senator Spooner:

"I understood him also to say that there were some thousands of Indians who were not full-bloods who were not capable of protecting themselves and taking care of their interests."

Senator Teller:

"Undoubtedly that is true."

Senator Spooner:

"I thought, upon that statement, that, providing it could be lawfully done, the restrictions to be imposed upon any nation should be left subject to the discretion of the Secretary of the Interior in order that those who were fit might be relieved, without at the same time subjecting the large number who were not fit to spoliation." (Vol. 40, p. 5177).

As the discussion proceeded, Senator Teller said further:

"Mr. President, I wish to say just a word. The Senator from Wisconsin has referred to the fact that I said some of the full-bloods were capable. **I do not think, taking the full-bloods as a rule, that they are capable.** (Black type ours.) Neither do I think the half-breeds are capable. But there are a great many

Indians, who have a little Indian blood, who are very capable." (Vol. 40, p. 5177).

On another day when the same question as to the full-blood Indian was under consideration, Mr. McCumber said:

"Mr. President, we have but these few remnants of the people left, and I confess that my sentiment joins with my sense of justice in announcing that there is a duty upon the Government of the United States to protect those few remnants of full-blood Indians in the Indian Territory if it is possible to do so." * * *

'The Indian is improvident. I never saw one yet—a full-blood Indian I am speaking of now—who had any property which could be sold that a white man could not obtain in six months for one-half of its value, if he stayed by him long enough and tried to impress him with the necessity of selling it. Whenever we have given the Indian the right to sell his land, he has sold it. Not only that, but I am informed to-day by some of the best authority from the Indian Territory, that for a bottle of whiskey up to $5.00 there are hundreds of thousands of claims that have been already sold subject to the possibility that Congress might ratify those previous sales.' * * *

'Now, Mr. President, we have passed the kind of laws I have stated. I think we have made treaties with the Seminoles that there shall be no restrictions on some of their lands. So have treaties been made with others that the restriction shall expire within a certain time; with still others that it shall expire in a little longer time; with still others that it shall remain for twenty-one years, I think. So there are several different laws fixing restrictions upon the sale of their lands which shall be allotted to them.

'In a great many instances they have attempted to sell the lands, whether homesteads or otherwise, despite the restrictions, and for almost nothing. Can we not say with almost absolute certainty that if you give them the power of sale within a few months all

of the property will be transferred from the Indian to white settlers, and transferred for whatever the white settler sees fit to give him?" * * * (Vol. 40, p. 3345-3346).

Again, Senator McCumber said:

"Mr. President, I do not quite understand, I fear, the full purport of the argument of the Senator from Missouri (Mr. Stone). It it means anything—and I know that it does—it simply means in effect that one of the rights of citizenship acquired by the Indian is the right to have all of his property taken from him by the white population without any further protection of the government.

The Senator, as I understand, when he said there were 95 per cent of those people as capable as those in any other community of taking care of their property, referred only to the mixed bloods, and not to the full-blood Indians. If I am in error the Senator can correct me."

Senator Stone:

"I said, or meant to say, that from the information I have, perhaps there were 15 to 20 per cent of Indians of the full-blood and mixed blood who, it might be said, were not competent."

Senator McCumber:

"There are about 24,000, I think, of the full-bloods left. **Of those 24,000 it is probably true that not 2 per cent of them would be capable of holding their own property and protecting it against the wiles of the white men, and it is for the benefit of those full-blood Indians that I have introduced the amendment. It does not affect any of the others.**" (Black type ours).

Senator Stone:

"The Senator says that not more than 2 per cent of the 24,000 of those full-blood Indians are capable of managing their own affairs. I think that is a pretty strong statement."

Senator McCumber:

"I think it is not quite strong enough." * * *

"I base my statement, Mr. President, first, upon a pretty intimate acquaintance with full-blood Indians themselves. Almost ever since I can remember I have been acquainted with the Indians, with their characteristics, and have had a good deal of dealing with them, and have seen their dealings with white people. Taking my own acquiantance and observation wherever I have seen them have any business relations with white men, and taking the testimony which was given before the committee, which was to the effect that the full-blood Indians down in the Indian Territory did not differ materially in their character for indigence from the full-blood Indians anywhere else, I think I can safely say that almost 90 per cent of them would not be able to withstand the onset of the white civilization to get possession of their property. If that is true—and I think everyone who knows anything about the Indian character will agree with me that it is true—we come right back to the question whether or not it is our duty and whether we are not in conscience obligated to protect those Indians by such means as are necessary to protect them." * * * (Vol. 40, p. 3347).

If the Act under consideration, considered in connection with prior and subsequent acts, affecting the same subject, does not conclusively show that Congress was dealing only with the question of the disability of full-blood Indians and their incompetency to manage their own property, the discussion of the question in the Senate would certainly make it conclusive that that was the controlling subject in the legislative mind. Nor can an utterance be found from a member of either house, so far as we are able to ascertain, to the effect that there was any purpose to limit the protection thrown about the full-blood Indian to any part of his property which may have been derived from the tribal estate; and so we must

again insist that if it be true that under the law passed this class of Indians can only be protected as to directly allotted lands and not as to tribal lands owned by them through inheritance, then it must be said that Congress, with the full knowledge of the incompetency of the full-blood Indian, has deliberately left him in a situation to become the easy victim of the rapacity of the white man with whose methods Congress seemed to be so familiar and against which it proclaimed its desire to protect him. No reason can be assigned, we repeat, why the full-blood Indians are any more competent to providently handle his inherited land than he is to handle his direct allotment and this fact brings both classes of lands equally within the reason of the law. Congress cannot have attributed to it the purpose of enacting a law under which an incompetent person, under its protection, would be permitted to squander his estate.

CHANGES IN THE WORDING OF SECTION 19 IN ITS PASSAGE THROUGH CONGRESS.

Undue importance has been attached by defendants in error to the fact that some changes were made in the language of Section 19 between the time of its introduction in the house and its final passage. Under the circumstances and considering the large number of subjects dealt with in the bill and the final changes made, treating of some of the subjects first embodied in Section 19 in other sections of the Act, the matter upon which they rely is, in our opinion, not significant. Section 19, as first introduced, contained the provision for the removal of restrictions upon all Indian allottees of the Five Tribes except Indians of full-blood and except minors, and with the

exception of homesteads; and also for the removal of restrictions upon allottees who were full-bloods except minors and except as to homesteads upon the approval of the Secretary of the Interior under rules, etc. The section then read:

"That all the restrictions upon the alienation of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, except Indians of full-blood and except minors, are, except as to homesteads," hereby removed, and all restrictions upon the alienation of lands of allottees of said tribes who are full-blood Indians, except minors and except as to 'homesteads,' may be removed by the Secretary of the Interior under such rules and regulations as he may prescribe, but the removal of the restrictions upon alienation shall not in any manner affect leases, and for the purpose of this section the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. Full-blood Indian allottees of said tribes may alienate any of the lands allotted to them, except homesteads, with the consent and approval of the Secretary of the Interior, and not otherwise, and all laws or parts of laws inconsistent with the provisions of this section are hereby repealed: **Provided,** That the lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee." (40 Cong. Rec., p. 1260).

The bill as originally introduced contained Section 22 in the following terms:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands

by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the County in which said minor or minors may reside, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe." (40 Cong. Rec., p. 1264).

The last clause of Section 22 as then introduced made all conveyances subject to the approval of the Secretary of the Interior under rules, etc. This was amended by limiting the supervision of the section to conveyances made "by heirs who are full-blood Indians or minors." In discussing the last sentence of this section, and in explanation of the provisions of the bill, Mr. Curtis said:

"The last part of the section retains in the hands of the Secretary of the Interior the control of the property belonging to full-bloods, because in other sections of the bill we have reserved to the Secretary control of the land owned by full-blood Indians and the last Section only applies to full-blood Indians and full-blood minors." (40 Cong. Rec., p. 1265).

At this stage of the legislation Section 19 contained provisions for the removal of restrictions from Indians of every degree of blood with certain safeguards and restrictions as to a part of the lands of full-blood Indians and minors and with provisions for the removal of restrictions as to full-bloods under rules of the Secretary, etc.; but when the bill reached the Senate two entirely new features were injected into it in an amendment offered by Senator McCumber providing for an extension of restrictions on the lands of all full-bloods for a term of twenty-five years, and depriving the Secretary of the Interior of the

right to remove restrictions. This amendment is in the following words:

"That all restrictions upon alienations and leasing of lands of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of less than full-blood are, except as to homesteads, hereby removed; that no full-blood Indian of any of said Tribes or his full-blood heirs, shall have power to alienate, sell, dispose of, or encumber in any manner, any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress." (40 Cong. Rec., p. 3273).

The first sentence of the McCumber amendment, as will be seen, limits the restriction removal feature to Indians of less than full blood.

In the conference report of March 16, 1906, (Report 2347, pp. 5 and 6), and likewise the report of March 19th, 1906 (Senate document 2697, p. 5 and 6), Section 19 still contains the first clause providing for the removal of restrictions on the lands of Indians of less than full blood. Subsequently, however, the section was modified in the Senate by striking out the first clause relative to the removal of restrictions so that the section read "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, etc., etc., which is the form in which the section was adopted. (40 Cong. Rec., p. 4992).

At the time this last amendment was made Section 22 of the Act also had taken its present form because of the amendment offered by Senator Curtis, as subsequently slightly modified by omitting the reference to minors.

Now, when it is considered that when this Act was voted on in its final form by both houses that Sec-

tion 19 made no provision whatever for the removal of restrictions, but became a provision for the extension of restrictions on the entire class of full-blood Indians, and when it is considered that Section 22 was the only provision dealing with the removal of restrictions and that that section in the last sentence thereof provided fully for the protection of full-blood Indian heirs, adult or minor, by requiring that sales made by them should be approved by the Secretary of the Interior and that both provisions of the bill as finally passed were before Congress in that form, it cannot be said with any plausibility that Congress did not intend that all these provisions should be effective. All provisions for alienation were finally encompassed in Section 22, including the terms upon which alienation by heirs can be made; and the limitation placed by that section upon alienation by heirs who are full-bloods must, we think, be construed to have binding force and a general application throughout all the Tribes to alienations made by such heirs. No other construction is consistent with the unity of plan evidently contemplated by Congress. Section 19 was intended to extend restrictions generally upon full-bloods of all the Tribes. Section 22 is intended to provide the rule under which inherited lands may be alienated throughout all the Tribes and among Indians of whatever degree of blood, with the special safeguard in the last sentence as to alienation by full-blood heirs; and it applies to all lands under restrictions at the date of enactment.

When the legislation assumed its final form restrictions absolute as to period were all in Sec. 19, and the restrictions, subject to the action of the Secretary, on inherited lands, were all in Sec. 22. This is a logical classification of the subject. There was then no further necessity for the term "full-blood

heirs" to appear in Sec. 19 under any theory of the purpose in view; and it could not so have appeared without unnecessarily including the same subject in both Secs. 19 and 22, or, without having a part of the provision on that subject in Sec. 19 and another part in Sec. 22.

As previously pointed out, restrictions expired under the Creek Supplemental Agreement August 8th, 1907. The Act of April 26, 1906, went into effect approximately fifteen months prior to that date. Now, counsel for defendants in error admit that between April 26th, 1906, and August 8th, 1907, that alienation of land by a full-blood heir must be made in accordance with the provisions of the last sentence of Section 22. In other words, they concede, as we understand them, that that provision of Section 22 became operative for that limited period; but they say that it ceased to operate on August 8th, 1907, and that it was only intended by Congress to provide a rule of alienation until the latter date. What is there in the entire Act or in the situation that Congress was dealing with that gives any support whatever to this theory? Where can anything be found in the nature of the subject dealt with and in the manifest intention of Congress that suggests any such theory of the limited operation of this provision as to time. An examination of the statutes and Agreements made between the government and the various Tribes as to the time in which restrictions would expire throughout the various Tribes will show that a very large percentage of the inherited lands of full-bloods would have been freed from restrictions some time in the summer of 1907, but for this Act of 1906. Now, if a construction is to be given to the Act under which restrictions on inherited lands are to still expire, as provided in the first Acts and Agreements, it would

have to be concluded that the Act has fallen very far short of affording that protection to the full-blood Indians generally, which seems to have been the intention of its framers, as appears not only from the Act itself, but from what they said at the time concerning it. Had it been the purpose of the framers of Section 22 to give it that effect, it would have been most easy and the most natural thing for them to have prefixed to the last sentence in Section 22 the following words: **Until restrictions expire under existing law** "all conveyances made by heirs who are full-bloods," etc.; but, the fact that they placed no limitation whatever upon the period that the last sentence of Section 22 should be operative, makes it evident that they intended no such limitation and that its operation continues until the disability of full-blood Indians to alienate their land, as provided in Section 19, shall have been removed by Act of Congress, or until Congress shall otherwise provide.

It is true that Section 19, according to the first amendment offered by Senator McCumber, contained the expression that no full blood Indian, etc., "or his full blood heirs" shall have power to alienate, etc., but it is likewise true that at that time Section 19 contained a provision for the removal of restrictions; but, it will be seen that the subjects first embraced in the amendment were divided and the feature relative to removing restrictions was placed in Section 22, thus leaving in Section 19 only the provision for the extension of restrictions as to full blood Indians generally and fixing their disqualification to alienate their lands; and as Section 22 as passed contained all the provisions of the Act, removing restrictions, and as the lands of full-blood Indian heirs became alienable thereunder upon the condition expressed in the last sentence of the section that is, upon the ap-

proval of the Secretary, the words "or his full-blood heirs" could then be omitted from Section 19, and Sections 19 and 22 taken together would still provide a disqualification of the full-blood Indian to alienate his lands for a period of twenty-five years unless sooner changed by Congress, and also permit a full-blood heir to alienate inherited lands as provided in the last clause of Section 22. The two sections taken together and construed together, would, therefore, contain definite and specific provisions as to the following subjects:

1st. The legal status of full-blood Indians of all the Tribes as to their power to alienate their lands derived from their tribal estate.

2nd. The right of mixed-blood Indian heirs throughout all the Tribes to dispose of inherited lands with provision as to minors.

3rd. The conditions under which Indian heirs, who are full-bloods, might alienate their inherited lands.

Under this interpretation of the law none of the subjects under consideration by Congress or contemplated in the Act are left unprovided for, but a comprehensive rule is established embracing all the subjects and applicable to all the Tribes.

It is contended in effect by counsel for defendants in error that Sections 19 and 22 cannot be considered together as forming one plan, because the sections are separated by two other sections of the Act. We submit that there is no merit in this contention, as will be seen when the subjects in the intervening sections, 20 and 21, are considered. Section 20, immediately following Section 19, which disqualifies the full-bloods to alienate their lands, provides the terms under which their surplus lands may be leased, that is, with the approval of the Secretary of the Interior,

making void all leases without such approval also for the leasing of lands of minors and for the recording of leases.

Section 21 provides for the disposition of lands of Indians who die intestate without heirs, etc. Section 20 is a restrictive statute and naturally and logically follows Section 19; and Section 21 deals with a subject necessary to be provided for and one not foreign in any sense, as it makes provisions for the disposition of the lands of intestate decedents. The subjects considered in these two sections are followed then by Section 22, removing restrictions from inherited lands of allottees generally, and fixing the condition of alienation by full-blood heirs, all of which is followed by Section 23, restricting the power of a full-blood to make free disposition of his lands by will without the approval of the Secretary.

We, therefore, have five sections dealing with subjects and phases of the same subject of such a character that it can not be said with any force that the mere order of the sections have any significance whatever; nor do we believe it can be said that any different order and arrangement of the sections would be suggested by the construction and meaning contended for by plaintiff in error. See Sections, *ante* p .

LEGISLATIVE CONSTRUCTION.

We give also below, Sections 8 and 9 of the Act of May 27th, 1908, which we again contend were enacted upon the theory that the above provisions of the Act of 1906 have the construction contended for by us. They furnish the legislative interpretation of the prior Act. The latter two sections are as follows:

"Sec. 8. That section twenty-three of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words 'or a judge of a county court of the State of Oklahoma.'"

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for, die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this Act, are hereby made applicable to all wills executed under this section." (35 Stat., p. 312.)

As heretofore pointed out, it is entirely impossible to reconcile these two sections with any theory of the legislative understanding of the status of the sub-

ject dealt with—under prior legislation, except the theory, that Congress understood that the class of lands embraced in the sections had, under former legislation, been maintained under restrictions. This interpretation of former legislation is important to be considered.

As said by this court in Cope v. Cope, 137 U. S., p. 682:

"These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones;" citing U. S. v. Freeman, 3rd Howard, 556.

And also by Southerland on Statutory Construction, paragraph 283:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively, and construed together, as though they constituted one Act. This is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared; harmonized, if possible; and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the latest enactment." (2nd Ed., Sec. 443.)

It thus appears that both the historical and legislative interpretations of the Act of 1906 give it one and the same purpose and application.

Sections 19 and 22 superseded and supplanted Section 16 of the Supplemental Agreement on the subject embraced in those two sections. Said Sec-

tion 16 of the Supplemental Agreement reads as follows:

"Lands allotted to citizens shall not in any manner, whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior; etc., etc."

The above section superceded and displaced Section 7 of the original Creek Agreement, approved by Congress March 1st, 1901. Sections 19 and 22 dealt with the subject of full-bloods; the inherited lands of mixed-bloods, adults and minors; and the inherited lands of full-bloods, and superseded Section 16 of the Supplemental Agreement as to those subjects. Under Section 16, as already pointed out, the Indians were not classified as to their competency. The Act of 1906, recognized the necessity of a classification in that regard and of provisions adapted to the different classes. Sections 19 and 22 were designed to accomplish that result, and in so doing necessarily superseded and supplanted anything to the contrary found in Section 16, and a construction of Section 22 which would leave it inoperative by the revival of a provision in a statute, which it had superseded as to the same subject, would be far-fetched indeed. Yet that is exactly the position of defendants in error. They concede that Section 22 furnished the rule under which full-blood heirs could alienate between the time of its adoption and August 8th, 1907, when restrictions under Section 16 of the Supplemental Agreement expired; but that thereafter the last clause of Section 22 became inoperative, and the provisions of the Supplemental and re-

pealed statute again became the rule under which rights are to he determined. There is nothing in the section nor in the general purpose which gave rise to it that will justify any such theory; and, furthermore, all conflicting provisions of prior statutes are repealed by Section 29 of the Act of 1906, including, of course, Sec. 16 of the Supplemental Agreement if it is really in conflict with Sec. 22 or any other part of the repealing Act.

If we are correct in the view taken of these statutes, then the expression "under this provision," found in the last sentence of Section 22, could not have the significance contended for by defendants in error, because the right of the Secretary to remove restrictions from the lands, as provided in Section 16 of the Supplemental Agreement, is taken away by Section 19 of the Act of 1906 as to full-blood Indians, and the right of mixed-blood Indians to alienate inherited lands is provided in Section 22 of the Act of 1906; and the same section, that is, the last sentence thereof, provides the method by which full-blood heirs may alienate their lands. The provisions are therefore, complete for all purposes in the Act of 1906, and all conveyances made thereafter by the classes of Indians designated, until otherwise provided by Congress, would of necessity be made "under this provision," and not otherwise after its adoption; as it then became the only authority under which inherited lands of full-blood Indians could be alienated, all conflicting authority being repealed by said Section 29.

CONSTITUTIONALITY OF THE ACT OF 1906— NOT AFFECTED BY CITIZENSHIP OF THE INDIAN.

If we have been able to read the authorities correctly then one of the questions which has frequently arisen in dealing with Indian matters has been settled by the courts, and by a long line of adjudication put beyond further controversy, unless the question is to be reopened for consideration anew, and that is, that the conferring of citizenship upon an Indian and subjecting him to the police authorities of the State where he resides does not deprive the government of the right and power to still legislate concerning his property and as it deems best for his general protection. We shall nevertheless briefly refer to some adjudication on the subject. One of the early cases in which this question was squarely presented was decided sixteen years ago by the Circuit Court of Appeals of the Eighth Circuit, opinion by Thayer, and we quote from the opinion in that case as follows:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges and immunities of citizens, while it retained, for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real estate, and to withhold from the donee for a season the power to sell or otherwise dispose of it. And we can conceive no sufficient reason why the United States, in

the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with the dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it on the part of the citizen to dispose of land which he may own in any way that he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it."

Beck v. Flournoy Live Stock Co., 65 Fed., l. c. 35.

This language was quoted and approved in Goodrum v. Buffalo, 162 Fed., decided twelve years later, by the same Circuit Court of Appeals, at page 822.

In Cherokee Nation v. Hitchcock, 187 U. S., l. c. 307–308, this court through Mr. Justice White uses the following language:

"There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the Act of 1898 has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States v. Rickert, 188 U. S., l. c. 437, the controversy as to the right of a State to tax certain property belonging to an Indian living on an allotment made under the Act of 1887, which Indian was a citizen of the United States and a citizen of the State of South Dakota, was before the court. In the latter case the court, speaking through Mr. Justice Harlan, says:

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the Agreement of 1889, ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship."

A restriction against alienation upon the land for a given period is designed to accomplish precisely the same purpose that is accomplished by the United States holding the land in trust, and preserves to the government the same power which it has when acting as trustee.

As said in United States v. Allen (C. C. A.), 8th Circuit, 179 Fed., l. c. 17:

"Under the General Allotment Act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of 25 years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other; etc., etc."

The court then refers to the decision in United States v. Rickert, 188 U. S. 432, above, and shows

that the decision in the Rickert case did not turn upon the fact that the government held the land as trustee, but upon the broader ground of the power of the government to enforce its policies of protecting the Indian in the enjoyment of his property.

On the effect of citizenship upon the right of the government to maintain its policy, the same court (l. c. 19 and 20) uses the following language:

"Much of the brief is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the Heff case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in the United States v. Celestine, 215 U. S., 278, lends no support to the defendants. * * *

The grant of citizenship to the members of the Five Nations was intended for their protection, and not to strip them of the protection of national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised, to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the State of their residence, this court still said in the case of United States v. Thurston Co., 143 Fed. (C. C. A.), 287–288: 'Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race.' Clothing them with citizenship did not change their character or invest them with full

industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of national government to protect the Indian ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language."

In United States v. Celestine, 215 U. S., l. c. 290–291, the court says:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

This doctrine finds support also in the case of United States v. Sutton, 215 United States, 291. The opinions in the above cases refer approvingly to decisions of the 8th Circuit Court of Appeals, found in United States v. Mullin, 71 Fed., 682; and Rainbow v. Young, 161 Fed. 835, in which the same principles are announced.

The decision in the Heff case, so much relied upon whenever the authority of the government is questioned, cannot now in view of the decision of the Celestine case above be considered an authority

against the right of the government even to exercise a police authority over the Indian allottee in a State where such authority has not been heretofore specifically relinquished, and the doctrine of the Heff case never did question the power of the government to deal with the property of an Indian citizen on which restrictions were maintained or where the same was held in trust. As said in McKay v. Kalyton, 204 U. S., l. c., 467, in an opinion by Mr. Justice White:

"Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision in the matter of Heff, 197 U. S., 488, dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the State of which they had become citizens."

We, therefore, submit that no authority can be found where the right of the government to exercise such jurisdiction as it may deem necessary over the property of an Indian allottee although a citizen of the United States and of the State where he resides has been denied; but that in every instance where this question has been presented to this or the inferior courts in whatever form it may have assumed and under varying circumstances, it has been uniformly ruled that the mere question of citizenship did not affect the question of the government's right; and although it were concluded (no statute so providing) that the Indians of the Five Civilized Tribes have been entirely subjected to the police authorities of the State of Oklahoma, and that the government has relinquished all right to exercise such authority over them, that fact alone would, nevertheless, not deprive the government of its power of supervision or guardianship,

if it may be so termed, over the property of the Indian, derived from the tribal estate. The authority over the person may be relinquished and the authority over the property maintained, as said in United States v. Hall, 171 Fed., l. c., 218:

"Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other the management of his estate. We have seen it has been settled that the government may at any time terminate this relation of guardianship. It follows, therefore, it may at its pleasure emancipate the Indian from personal control and still retain the other function of managing and conserving his property. That the emanicpation of the Indian from further Federal control was the purpose of Congress is so plain from the language employed in the Act of 1887 that no argument could make it plainer. The purpose of the government to protect the title of allotted lands has been declared with equal distinctness."

No valid reason has been assigned why this Act is not within the legitimate exercise of the power of Congress in the premises. The sum of the argument against the constitutionality is that the Indian is a citizen of the United States, and that he holds his land in fee simple. The question cannot be affected by the fact that he is a citizen of the State of Oklahoma because on the date of the passage of the Act, Oklahoma was not a State and the Indian, at that time, sustained his tribal relation, lived upon or owned an allotment carved out of the reservation located in a Territory under the exclusive jurisdiction of the United States. The objection on the ground of his citizenship, as fully appears from the preceding authorities, cannot be maintained; and if holding the title to his allotment deprives Congress of the power exercised, the objection could, with equal force, apply to the power of Congress to deal with the tribal prop

erty where the title to same is vested in the tribe; and this would challenge the validity of a policy of the government resting on more than a century of legislative usage. Where the Indian is still a member of his tribe, and the government maintains restrictions and conditions upon his allotment, Congress, it would seem on principle, would have equally as much right to legislate concerning that property as it would to legislate concerning tribal property, owned by the Tribe without power of alienation or disposition. The right in both instances proceeds from the authority which the government has assumed to exercise for the protection of the Indian. From whatever source that authority may emanate, the right of its exercise has been sustained by this court from the beginning. The broad ground on the question of this power, announced in United States v. Kagima, 118 U. S., l. c. 384, in an opinion by Mr. Justice Miller, which has been so many times since referred to and reiterated by this court, is amply sufficient for all the purposes of this case. In that case it was said:

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The court at that time, and in earlier and later decisions, did not deem it necessary to vaguely assert the power, to exercise this authority, under the clause of the constitution relative to the government of the Territory belonging to the United States, or, under

the clause giving Congress the power to regulate commerce with the Indian Tribes.

A restriction upon the alienation of the land of an Indian, imposed by Congress, is an agency for the exercise of a Federal power. And, so long as the restriction remains, the power may be exercised in the manner and to the extent deemed best by Congress.

A power so long exercised will not be deemed abandoned by mere implication or construction. Authorities under proposition IV.

Congress has exercised and continued to exercise the power of legislating for the benefit of the Indian and concerning his property rights from the beginning until the Act of May 27th, 1908. This power, we think, will continue until the jurisdiction over the subject is specifically relinquished. This has not yet been done.

THE FIFTH AMENDMENT.

It is asserted again, not by plaintiff in error, not by his Tribe, but by third parties, attempting to acquire his lands, that he is a citizen of the United States, and of the State of Oklahoma and, therefore, this legislation is in contravention of the fifth amendment to the constitution of the United States declaring that "no person shall be deprived of life, liberty, or property without due process of law." Just what relation citizenship has to this constitutional guaranty we do not clearly see; nor is it clear, from this legislation, that any one having a right to object is being deprived of any of the rights protected by the amendment; but if so, being a citizen of the United States would probably not be a prerequisite to the defense of those rights. There are many persons in this

country who are not citizens and much property is owned here by that class; and it is not conceivable that they could be deprived of life, liberty or such property without due process of law although not citizens. Such a course would not only violate the fifth, as well as the fourteenth, amendment, but would likewise be abhorrent to the principles of free institutions.

It seems to us that defendants in error are laboring under a confusion of ideas both as to the effect of citizenship on the subject and as to the proposition that these statutes are depriving the persons affected of rights of some character. The government and the Indian both assume that restrictions upon the sale of the property of a full-blood Indian and the approval of the sale by the government is a protection and a benefit to the Indian. They are the two interested parties in the Agreements and legislation under consideration and both are satisfied therewith. The white man, on the other hand, or that class of white men rather desiring the opportunities of trade with the Indian, assumes on the contrary, that any restriction of trade in Indian property is a burden to the Indian and a violation of some right which is asserted for him. This fundamental difference in the premises reckoned from is the chief source of the entire controversy. We do not, however, feel called upon here to enter into an extensive defense of the position of the government and the Indian upon this question. If the third party, charged with no responsibility to protect the Indian's interest, has any right to object to the relation of the Indian and the government with which both the latter are satisfied, it can at least be said that the objection comes rather late and that upon such objection a policy, quite as old as our constitu-

tional history, will hardly be changed as long as its maintenance is still deemed necessary by the parties concerned in the governmental process of winding up the affairs of the Tribes.

STATUTES NOT IN DEROGATION OF COMMON RIGHT.

It is contended further that the statutes in question—that is, Sections 19 and 22, likewise Sections 8 and 9 of the Act of 1908—are in derogation of common right and, therefore, are to be strictly construed. Let us briefly examine this objection. In the first place, who is in a position to take advantage of an objection to a statute on that ground? Can it be done by a stranger to the operation and effect of the statute? Or would it not rather have to be done by the person affected thereby—that is, the one suffering the hardship imposed by the statute? Watson on the Constitution, Vol. 1, page 816; Walsh v. Columbus R. R. Co., 176 U. S. 479. Who is objecting to this statute on that or any other ground? It is certainly not the plaintiff in error or his Tribe of Indians. It is not objected to by any other Tribe of Indians affected, so far as we are advised. The statutes have the support of the Department of the Interior charged with the care of Indian affairs. This is evidenced in the approval by the President of the act of the Creek National Council which authorized the prosecution of this writ of error. They likewise have the support of the Department of Justice, as that department has appeared in the case because of the general interest of the Government in the application and validity of the Act as affecting all the Tribes. The plaintiff in error is invoking the aid of

the court in order that he may have the protection and the benefits of the statute, not to relieve himself from any burden thereof. The Tribe of which he is a member has officially, through their National Council, ratified and approved the Act of 1906 and all the provisions thereof now relied upon by plaintiff in error. The National Attorney of the Creek tribe, of which plaintiff in error is a member, appears as one of the counsel in this case, all because of the interest of that Tribe in the construction of the statutes contended for by plaintiff in error.

Who is complaining? No one directly affected by the operation of the statute; only the speculator in Indian lands; not even the farmer or homeseeker, as they would not object to a sale under approval by the Secretary or other authorized authority, as they expect to pay the reasonable value of property. But the objection comes wholly and solely from that class of persons who desire an opportunity to deal with the full-blood Indian standing alone in his almost helpless condition because of lack of knowledge of business affairs and of the value of property. The objection is from the class of white men who understand this situation of the Indian and desire the opportunity to negotiate with him for his property on the basis of the white man's superior business sagacity. They have become the guardian of his constitutional rights so-called—that is, his right to be relieved of his property. So, when this objection is analyzed and reduced down it will be found that the "right" which is being violated is not, after all, the Indian's right. A voice thus raised, although pretendedly in the interest of the Indian, should be heard with some suspicion when known to emanate from a greed and avarice, hungering to devour his remaining substance, and seeking to turn a

policy intended for his advancement into an instrument for his destruction.

POSITION OF DEFENDANTS IN ERROR.

Counsel for defendants in error, while not denying that Congress has expressly declared the incapacity of the full-blood Indian, nevertheless, assert in substance that it was the congressional purpose to protect the full-blood Indian in his ownership of a part of his property, but to let him deal with the other part as he may choose and thereby acquire an experience in business affairs that would make him a more valuable citizen. Such a proposition is ridiculous upon the very face of it and cannot be reconciled with any theory of the Indians' best interest or any rational purpose on the part of Congress. They say, too, that this is evident, because of the fact that in numerous instances, especially among mixed-blood Indians, Congress has provided that a part of the lands of the mixed-blood shall be inalienable while other portions of his land may be alienated at his will; and this class of legislation is suggested as analogous to the legislation under consideration according to their construction of it. This argument, we think, wholly misconceives the policy of the legislation affecting mixed-bloods, in which they are required to hold a part of their lands for a time and permitted to alienate another part without supervision, for the reason that the latter legislation proceeds upon the theory that the mixed-blood Indian is competent to deal with his lands on his own account, either as to a part or as to all his lands; but that it is best for the Indian to retain a given part of his holdings for a certain period of time in order that

he may have a fixed abiding place and thereby a better opportunity to acquire the habits of industry and frugality; and that although competent to providently dispose of his lands, it is in his interest and in the interest of the policy of the Government for him to become experienced in individual ownership of property and to have a permanent abiding place. Laws of this character, therefore, proceed upon an entirely different principle from the statutes under consideration with reference wholly to full-blood Indians, because in the one case the Indian is declared to be competent and in the other he is declared to be incompetent.

It is suggested, also, that it was not the purpose of Congress that the Indian should have a large amount of land and that is assigned as a reason why the full-blood Indian was permitted to sell, sacrifice, or give away, his inherited land. This argument is unsound for this reason: If Congress had not intended that an Indian should have the benefit of more land than his direct allotment, why did it provide a law of inheritance at all? All enrolled Indians of the Tribe, children included, received allotments in equal amount. If Congress thought such amount was enough for any one Indian to own and as much as he was entitled to the benefits of, why did it provide for lineal and collateral inheritance? The fact that it did so provide is a complete answer to the argument advanced, that Congress never intended that the Indian should enjoy the benefits of more than his original allotment. Had Congress intended any such a limitation on the amount that any one Indian should be entitled to have the benefits of, it could easily have provided that the lands allotted to any Indian on his death should become a part of the surplus property of the Tribe or escheat to the

Government or State, instead of descending to heirs under the laws of Arkansas. The fact is the tribal lands all belonged to the members of the Tribe. Those lands were guaranteed to them in the early treaty in which they accepted them in exchange for the lands owned by them East of the Mississippi river, and it cannot, therefore, be assumed that Congress ever intended that any part of them should become a sacrifice to "experience" in dealing with the white man. The suggestion of that folly, it will be observed, comes from the same white man. It had not occurred to either the government or the Indian.

This law does not prevent the alienation of inherited lands of full-blood Indians. It only prevents their sacrifice. Such lands may all be sold under the law, but with regard for the Indian's interest, that is, under the approval of designated authority.

Counsel for defendants in error have professed not to be able to understand how any particular significance can be attached to Section 23 of the Act of April 26th, 1906. We think the Court will not experience the same difficulty, but that it will be seen at once that Section 23 is one step in the progress of Congress toward a uniform plan for the protection of the full-blood Indians of all the Five Tribes. It shows, we think, that Congress attempted to protect this class of Indians against any possible form of alienation without supervision. Section 23 was understood to be for this purpose, according to the declaration and announcement to the members of the lower house of Congress by Mr. Curtis, the author of the bill, when he made his report upon same, as found in Volume 40, Cong. Rec., on page 1231, and where, after explaining the purpose of several features of the bill, this statement was made by him:

"The Bill further provides that any Indian may make a will, because under the terms of agreement the courts in the Indian Territory, as I am informed, have held that an Indian in the Territory has no right to dispose of his property by Will. The Section added to the Bill, 23, provides that they make Wills, and that the Will of a full-blood shall be acknowledged before a United States Judge or before a United States Commissioner. **Your Committee deem such a provision necessary in order to fully protect the interest of the full-bloods.**" * * * (Black type ours.)

The suggestion that this legislation, as interpreted by plaintiff in error, will tend to create large landed estates (in the Indian) is without a shadow of merit. Said Section 22 provides for the alienation of all inherited lands. The only restriction imposed is that full-blood heirs shall sell under supervision. This is not intended to prevent and will not prevent legitimate sales. It only prevents fraud, sacrifice and spoilation, and is necessary to the protection of an incompetent class.

The further contention that the last sentence in Section 22 was only intended to operate for the brief period between the passage of the Act where it occurs and the expiration of the period of restrictions under the Supplemental Agreement is also, we think, entirely without merit, and wholly irreconcilable with the purpose of Congress as it appears from all this legislation.

PRIVILEGES AND IMMUNITIES OF CITIZENSHIP.

One of the principal constitutional objections urged to the legislation in question is based upon the assumption that the privileges and immunities of the Indians concerned have been impaired, which, because of their citizenship, is a violation of their rights under the Constitution. The argument is not very specific as to what privileges and immunities are affected nor as to the legal meaning of those terms. The objection is placed upon the broad ground that, as citizens of the United States, any regulation of the alienation of their property is a violation of some right which they have as such. While it is perhaps true that the right to own and freely dispose of property is one of the rights inherent in every member of society organized into a free government, it does not follow from this, that the regulation of the sale of property under certain circumstances is still not within the legitimate province of government. In the Slaughterhouse cases, 16 Wall. 36, quoting from Corfield v. Coryell, 6 Federal Cases No. 3230, by way of defining the expression "privileges and immunities" this court said:

"We feel no hesitation in confining these expressions to those privileges and immunities which are **fundamental;** which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign? What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads:

protection by the government with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, **subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.**" (Black type ours).

Even in this broad definition, which this court has so many times since recognized the "privileges and immunities" are said to be "subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole;" all of which means, expressed in another way, that all the rights of the individual in organized society are subordinate to the rights of the people as a whole, and, therefore, subject to the regulation of government in the interest of the whole people. It is a well recognized practice of all governments to place such restraints upon the free action of individuals as may be necessary for the welfare of others, and it is familiar knowledge that, in all the States, laws have been enacted to protect the property of persons incompetent to protect themselves, and in such jurisdictions the legislative finding of incompetency is conclusive of the subject. Infants, imbeciles, incompetents, and spendthrifts, although citizens, are classes of people over whose property the government may exercise supervision and control, and prescribe the conditions upon which it can be alienated and the manner of doing same, by legislation. This power in government has never been doubted by any court so far as we are aware. It is justified upon two grounds; first, that the persons affected are of a class deserving the protection of the government, and second, that the welfare of the community as a whole is subserved likewise in their protection. Again, all States have laws determining the age at which both males and females reach their majority,

and prohibiting them from entering into binding contracts before reaching such period of majority. This is done upon the ground that prior to such age they are incompetent to make free disposition of their property, and that they and the public at large are benefitted by these safeguards imposed by the legislature. This age of majority differs widely in the different States, and may be changed by the legislature at will; and no minor can have a vested right in having the period remain stationary. This being a proper exercise of the powers of government, would there be any doubt whatever of the right of the legislature of a State, where no age of majority had ever been previously fixed by it, to pass a law of this kind that would be binding on the citizens affected? We certainly think not. This, too, notwithstanding the fact that a certain class would thereby be deprived of "privileges" previously enjoyed.

The full-blood Indians of the Five Tribes have been under the guardianship of the government from the beginning. At the date of the legislation in controversy their tribal status was recognized by Congress, and the executive and they were regarded by the government as an incompetent class and never have been permitted as a Tribe, or as individuals, to alienate property without the consent of the government, were not permitted to do so when the Act of 1906 was passed, the lands owned by them individually then being under restrictions. All this being true, what constitutional right of theirs, under the broadest definition of "privileges and immunities," could possibly be violated by the Act of Congress extending this period of their minority, so to speak, upon the ground that they are still incompetent to deal with their own property without protection for a still longer period. That they, the full-bloods, are incompetent

as a class in the opinion of Congress, as expressed in Section 19 of said Act, is not open to doubt. That being true, not only their well being as a class dependent upon the government, but, likewise, the well being of the people of Oklahoma and of the United States as well, is subserved by this legislation.

The fourteenth amendment to the Constitution of the United States provides among other things, in Section 1, that "No State shall make or enforce any law which will abridge the privileges and immunities of the citizens of the United States," and it has been decided by this court (Slaughterhouse cases) and later (203 U. S. 1) that the privileges and immunities of citizens of the United States are rights distinct from the privileges and immunities of the citizens of a State. Just how and to what extent the rights, under this provision, of the full-blood incompetent Indians have been violated, has not been pointed out very clearly by counsel for defendants in error.

Section 2 of Article 4 of the Constitution of the United States, provides that "the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States. When the Act of 1906 was passed the full-blood Indians of the Five Tribes were inhabitants of the Indian Territory, the people and property in which were all subject to the paramount authority of Congress thereover. Just how the rights, under this provision of the Constitution, of the Indians in the then Indian Territory were affected by this legislation, counsel for defendants in error have likewise failed to clearly point out.

CITIZENSHIP LEGISLATION.

Under the General Allotment Act of February 8th, 1887, 24 Statutes 388, a provision is found in Section 6 relative to the citizenship of Indians. The Section reads as follows:

"Sec. 6. That upon the completion of said allotments, and the patenting of the land to said allottees, each and every member or the respective bands or Tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory, in which they may reside; and no Territory shall pass or enforce any law defying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the Territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any Tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the same Act contained the provision excluding from the operation of the Act the Territory occupied by the Five Civilized Tribes and others in the Indian Territory, reading in part as follows:

Sec. 8. "That the provision of this Act shall not extend to the Territory occupied by the Cherokees,

Creeks, Choctaws, Chickasaws, Seminoles, Osages, Miamas and Peorias, and Saxs and Foxes in the Indian Territory."

In the Act of March the 3rd, 1893, 22 Stat. 612, as heretofore pointed out, the consent of the government was given to the allotment of the lands of the Five Tribes and provision made looking to their allotment. Section 15 of the latter Act heretofore set out in full in the brief, declared among other things, as follows: "And upon such allotments the individuals to whom the same may be allotted, shall be deemed in all respects citizens of the United States." The scheme of allotment, however, was not accomplished directly under this Act of 1893.

On March 3rd, 1901, Congress passed an Act amending Section 6 of the said allotment Act of 1887 by inserting after the words "Civilized life" the words "and all Indians in Indian Territory," 31 Stat. 1447. This amendment is relied on, we believe, exclusively as the Act conferring citizenship upon the members of the Five Civilized Tribes; but the amendment was made, as will be seen, prior to the allotment of the lands of the Five Tribes, all of which were allotted under agreements and Acts of Congress made subsequently. There were in the Indian Territory many Indians other than those composing the Five Tribes; for instance, Osages, Miamas, Peorias, Sax and Foxes, and doubtless a considerable number of persons of Indian blood who had separated themselves from any Tribe, and in a measure adopted the habits of civilized life. To all of this class the amendment might apply, and may have been intended to be limited to such class. It is at any rate a little singular that if the intention was to confer citizenship upon all the members of the Five Tribes that they were not

designated in the amendment as the Five Civilized Tribes, as they have been designated in practically all legislation affecting them and as they were designated when excluded from the operation of the Act of 1887 by Section 8 thereof; and it is likewise a little singular that the provision quoted above from Section 8 of the allotment Act of 1887 was not expressly repealed.

We think it will have to be said, when the legislation affecting the citizenship of the members of the Five Tribes is considered, that the provision conferring citizenship are to say the least rather vague and indefinite, entirely too much so to establish the fact if the consequences of citizenship are as far reaching as claimed by defendant in error, and if the government, because of the fact of citizenship, is to be prohibited from carrying out its policy in dealing with them, believed by Congress to be for their best interests.

However this may be, we are convinced that, upon authority as well as the principle involved, clothing the Indian with the privileges of citizenship cannot deprive the government of the right to supervise his property rights and that the supervision of same within limitations concededly for his best interests, can in no way hamper or affect his enjoyment of all civil and political rights embraced in the "privileges and immunities" of citizenship of the United States; and that, therefore, whether he be a citizen or not, the legislation relied upon by plaintiff in error in this case was enacted by Congress in the exercise of a legitimate power.

OKLAHOMA CONSENTS.

The authority of the national government over Indian lands within the State of Oklahoma in whatever form or degree it may be exercised is in no sense inconsistent with the rights of the State of Oklahoma as one of the States of the Union admitted upon equal footing with the other States; nor does this authority in any way interfere with any rights which the State of Oklahoma has in the premises under numerous decisions of this court in other similar instances. This situation was fully contemplated when Oklahoma was admitted into the Union. Section 1 of the Act of June 16, 1906, 34 Stat. 267, providing for the admission of Oklahoma, commonly called the Enabling Act, contains the following provision:

Sec. 1. "That nothing contained in said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or legislation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

Clause 3 of Section 3 of the same Act provides as follows:

Sec. 3. "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe, or nation; and that until the title to any such public land shall have been extinguished

by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States," etc.

Section 22 of the said Enabling Act provides as follows:

Sec. 22. "That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

In pursuance of the last above provision of the said Enabling Act the Constitutional Convention which met and adopted a constitution for the State of Oklahoma in pursuance of the said Act, adopted the following provision as Section 497 of the said constitution:

Sec. 497. "Be it Ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocably, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,'" etc., etc.

The said Act of Congress and Constitution were both adopted subsequent to the passage of said Act of Congress of April 26th, 1906.

All this, in the light of adjudication on kindred questions, would seem to dispose of, without further argument, any claim that may be made, that the authority of the government herein asserted is in conflict with any right of the State of Oklahoma. Independent of these provisions, however, the right of the National Government to exercise its authority within a State over any subject committed to its care by the Constitution is too fundamental and well settled to require comment.

The full-blood Indian of the Five Tribes is here and now making his last stand. From the almost unlimited domain which he once occupied and called his, he has been removed onto the large reservation and from the large reservation onto the small or more remote one, but always kept on the outposts of the frontier, as far removed as possible from the advancing lines of industrial and social progress. If his present helpless condition can not be wholly accounted for in the circumstance of Indian blood, it may be that the course thus prepared for him, so largely through the aggressive cupidity of the white man, should bear some measure of the responsibility. Not content for him to occupy the reservation last assigned to him and thereon work out his own destiny, the same rapacity that pressed him westward so often before followed him up and demanded a partition of his lands, and by its persistence made that course seemingly necessary.

Yielding finally with reluctance to the fast multiplying encroachments from without and to the importunities of the Government, he consented, but with many misgivings, to the breaking up of the tribal estate and its allotment in severalty to the members of the Tribe.

Crowded thus at last entirely from the reservation and onto the single allotment, the remnant of his once broad heritage, he finds himself still pursued by that same insatiate greed, which, through a technicality of the law, if need be, would deprive him of that remaining measure of protection which the government has sought to retain about him, and which will not be stayed as long as a single acre of land remains in his possession. From this purpose of plunder and spoilation Congress has attempted to protect him in a manner making its intention, we think, unmistakeably clear. The authority of Congress in the prem-

ises has been challenged. His last appeal for a definition of his rights is now to this court.

The great importance of the question involved here is, in the nature of things, self-evident. The approximately 25,000 full-blood Indians, throughout the Five Civilized Tribes, that will be affected by a decision of the question, makes it of peculiar interest to all of those Tribes. The bearing a decision will necessarily have upon the policy of the government also lends an additional interest.

We have attempted and believe succeeded in showing,

First—That it was the evident intention of Congress, by the Act of April 26, 1906, to extend the period of restrictions upon the alienation of the lands of full-blood Indians for a period of twenty-five years; and to permit alienation of their "inherited lands" only under supervision.

Second—That the Act of Congress having this purpose in view is a valid exercise of the legislative power of the government over the subject dealt with.

If we are correct in this, the conclusion reached by the learned Supreme Court of Oklahoma is erroneous and has deprived plaintiff in error of the rights, benefits and protection intended to be guaranteed to him by the said Act of Congress, and should, therefore, be reversed.

Respectfully submitted,

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M. L. MOTT,
National Attorney for Creek Nation.
AND W. A. BRIGHAM.

ST. LOUIS, February 15th, 1911.

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